RELEVANT DOCKET ENTRIES

		Filing Date
Arizona Superior Court for Apache County		
1.	Complaint (Claim for Refund of Income Tax)	June 17, 1969
3.	Motion to Dismiss	July 14, 1969
18.	Amended Complaint (Claim for Refund of Income Tax)	Nov. 5, 1969
19.	Motion to Quash Amended Complaint	Nov. 10, 1969
31.	Order of Dismissal and Judgment	Jan. 12, 1970
33.	Notice of Appeal	Jan. 14, 1970
37.	Amended Opinion and Order	Jan. 23, 1970
Arizona Court of Appeals		
35.	Order; Court's Opinion (Affirmed)	Apr. 28, 1971
44.	Appellants' Petition for Review by the Supreme Court of the State of Arizona	June 22, 1971
50.	Minute Entry from Arizona Supreme Court, September 21, 1971, #10576-PR: Petition for leave to File Amicus Curiae Brief = GRANTED. FURTHER Petition for Review = DENIED	Sept. 22, 1971
52.	Notice of Appeal to the Supreme Court of the United States; Affidavit of Service (Received September 28, 1971)	Oct. 5, 1971

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE

ROSALIND McCLANAHAN,
Individually And On Behalf
of All Others Similarly
Situated,
Plaintiff,

vs.

THE STATE TAX COMMISSION OF
ARIZONA,
Defendant.

No. 4370

AMENDED
COMPLAINT
(CLAIM FOR
REFUND OF
INCOME TAX)

The Plaintiff, individually and on behalf of all others similarly situated, by and through her attorney, states her claim against the Defendant as follows:

I

The Plaintiff is a Navajo Indian residing on the Navajo Indian Reservation, within the confines of Apache County. The Defendant is the agency empowered to administer the income tax laws of the State of Arizona.

II

During the calendar year 1967 the Plaintiff's employer withheld, as required by Arizona law, from compensation earned by the Plaintiff, the sum of sixteen dollars and twenty-nine cents ($16.29), for and as Arizona income tax, and the Plaintiff's employer paid the same to the Defendant.

III

On or about April 1, 1968, the Plaintiff filed an Arizona State Individual Income Tax Return (Form 140) for the

calendar year 1967 with the Defendant and simultaneously therewith filed a written protest of the collection of any tax on the Plaintiff's income by the Defendant and a written claim for refund of the entire sum withheld from Plaintiff's wages. The Plaintiff's alleged Arizona state income tax liability was eleven dollars and eighty-four cents ($11.84). A true copy of Plaintiff's claim for refund is attached hereto as Exhibit "A", and incorporated herein by this reference. The Defendant has never refunded the said sum to the Plaintiff.

IV

The grounds upon which the Plaintiff protested the said tax and claimed refund of the funds withheld and paid by her employer, as required by Arizona law, are as follows:

(a) The Plaintiff is a Navajo Indian, and

(b) The Plaintiff resided within the confines of the Navajo Indian Reservation during the entire calendar year 1967, and

(c) The Plaintiff's income during the calendar year 1967 was derived from sources within the Navajo Indian Reservation.

V

The Plaintiff's refund claim which was filed on or about April 1, 1968, was neither granted nor denied by the Defendant. On or about October 4, 1968, the Plaintiff considered her claim disallowed and appeared to the Defendant Tax Commission, at which time her counsel appeared before the Defendant Tax Commission, on her behalf, and on behalf of all others similarly situated, and presented her appeal. At the hearing before the Defendant, the Plaintiff claimed refund upon the same grounds set forth in paragraph IV, above. The Plaintiff has received no notice of any determination of her refund claim and appeal thereof and is informed and believes that none has been made by the Defendant and therefore considers her claim disallowed by the Defendant.

VI

The Plaintiff is not subject to the assessment, collection or retention of Arizona tax upon her income because

(a) She is a Navajo Indian, and

(b) She resides, and at all times material hereto has resided, within the confines of the Navajo Indian Reservation, and

(c) Her income during the calendar year 1967 was derived from sources within the confines of the Navajo Indian Reservation, and

VII

Plaintiff is a member of a large class of persons who are Navajo Indians, living and working on the Navajo Indian Reservation, whose income the Defendant Tax Commission claims the power and jurisdiction to tax. The Plaintiff sues on their behalf in a representative capacity because:

(1) The class is so numerous that joinder of all members is impracticable,

(2) The questions of law raised by this action are common to the class and the questions of fact are typical of those which could be raised by all members of the class,

(3) The claims of the Plaintiff are typical of the claims of the class,

(4) The plaintiff in her representative capacity will fairly and adequately protect the interests of the class,

(5) The prosecution of separate actions by individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendant Tax Commission,

(6) The questions of law and fact presented in this action

common to all members of the class, predominate over any questions affecting only individual members, and

(7) A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

VIII

The funds expended by the State of Arizona in the provision of services and benefits to the plaintiffs, in the form, for example, of welfare assistance, education and highway construction or maintenance, are derived in large proportion from federal sources and programs established for the benefit of Reservation Indians. These federal programs are a fulfillment of the Federal government trust responsibility for Indians, and are administered by the State of Arizona, in effect, as agent for the Federal government.

IX

The government of the Navajo Tribe provides services and benefits to the plaintiffs at an annual cost of approximately $16,000,000. The funds to bear such costs are derived wholly from tribal sources.

X

The Defendant's attempted exercise of the power to tax the Plaintiff's income is an infringement upon the right of the Navajo Indians to govern their own affairs, to maintain their own political, social and economic independence and to maintain their own culture.

WHEREFORE, the Plaintiff, for herself, and on behalf of all others similarly situated, prays that the Court:

1. Grant judgment to the Plaintiff and against the Defendant Tax Commission for the full amount of her claim for refund, plus interest at the rate of six per cent per annum from December 31, 1967, and

2. Enter an order on behalf of all persons who are members of the said class, declaring it unlawful for the Defendant Tax Commission to refuse to grant their claims for refund, plus interest, and to continue to collect or assess tax upon their income, and

3. Such other and further relief as to the Court seem proper.

/s/ Theodore R. Mitchell

Theodore R. Mitchell, Counsel
For Plaintiff

Address:
Dinebeiina Nahiilna Be Agaditahe
Post Office Box 368
Window Rock, Arizona 86515
602/871-4151

I hereby certify that a Copy
of the foregoing Amended Complaint
was mailed this 4th day of November,
1969, to:

James D. Winter
Assistant Attorney General
State Capitol Building
Phoenix, Arizona

OPINION OF THE SUPERIOR COURT OF ARIZONA, COUNTY OF APACHE

See Jurisdictional Statement, Page No. 11a

OPINION OF THE ARIZONA COURT OF APPEALS

See Jurisdictional Statement, Page No. 2a

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROSALIND MCCLANAHAN, Individually and On Behalf of All Others Similarly Situated, *Appellant,* v. THE STATE TAX COMMISSION OF ARIZONA, *Appellee.*	1 CA-CIV 1316 DEPARTMENT B APACHE County Superior Court No. 4370 ORDER

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its opinion.

IT IS ORDERED that the opinion be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order together with a copy of the opinion be sent to each party appearing herein or the attorney for such party, and to THE HONORABLE D. L. GREER, Judge.

DATED this 28th day of April, 1971.

EINO M. JACOBSON
PRESIDING JUDGE

A true copy of the foregoing order was mailed this 28th day of April, 1971, to:

Mr. Bruce Bridegroom
P. O. Box 460
Window Rock, Arizona
86515
Attorney for Appellant

Mr. Donald Juneau

Dinebeiina Nahiilna
Be Agaditahe
Post Office Box Nine Sixty-Seven
Shiprock, New Mexico 87420
Attorney for Appellant

Mr. James D. Winter
Assistant Attorney General
159 Capitol Building
Phoenix, Arizona 85007
Attorney for Appellee

The Honorable D. L. Greer
Courthouse
St. Johns, Arizona 85936

Mr. Theodore R. Mitchell
P. O. Box 306
Window Rock, Arizona 86515

CLASSIE GANTT, Clerk
By Glenna L. Denton
Deputy Clerk

ORDER OF THE ARIZONA SUPREME COURT
DENYING PETITION FOR REVIEW

See Jurisdictional Statement, Page No. 1a

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

INDEX

	Page
INTRODUCTORY	1
THE OPINIONS BELOW	2
STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOLVED	2
QUESTIONS PRESENTED BY THE APPEAL	4
STATEMENT OF THE CASE	4
THE QUESTIONS ARE SUBSTANTIAL	6
CONCLUSION	17
APPENDIX A — MEMORANDUM DECISION OF THE SUPREME COURT OF ARIZONA	12
APPENDIX B — OPINION OF THE ARIZONA COURT OF APPEALS	2a
APPENDIX C — OPINION OF THE SUPERIOR COURT OF ARIZONA IN AND FOR THE COUNTY OF APACHE	11a

TABLE OF AUTHORITIES CITATIONS

Cases Page

Arizona ex rel. Merrill v. Turtle, 413 F.2d 983 (9th Cir. 1969), *cert. denied* 396 U.S. 1003 (1970) ..9, 10, 11

Big Eagle v. United States, 300 F.2d 765 (Ct. Cl. 1966)..... 18

Board of Commissioners v. Seber, 318 U.S. 705 (1943)..... 14

Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed* 203 U.S. 599 (1906)..... 10

Carpenter v. Shaw, 280 U.S. 363 (1930)..... 14

Cherokee Nation v. Georgia, 5 Pet. 1 (1831)..... 3, 8

Choate v. Trapp, 224 U.S. 665 (1912)..... 13, 14

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)..... 13

Choteau v. Burnet, 283 U.S. 691 (1931)..... 14-15

Commissioner of Revenue v. Brun, 286 Minn. 43, 174 N.W. 2d 120 (1970)..... 11

Donahue v. California Justice Court, 15 Cal. App. 3d 579, 93 Cal. Rptr. 310 (1st Dist. 1971)..... 18

Ex Parte Crow Dog, 109 U.S. 556 (1883)..... 9

Guss v. Utah Labor Board, 353 U.S. 1 (1957)..... 14

Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956)..... 9, 10

Johnson & Graham's Lessee v. McIntosh, 8 Wheat. 240 (1823)..... 12

Kansas Indians, 5 Wall. 737 (1867) 3, 8-9, 13

Kennerly v. Montana District Court, 400 U.S. 423 (1971)..... 3, 9, 16

CITATIONS (Continued)

Cases Page

Leahy v. State Treasurer of Oklahoma, 297 U.S. 420 (1936) 14, 15
Littell v. Nakai, 344 F.2d 468 (9th Cir. 1965), *cert. denied* 382 U.S. 986 (1966) 9
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 13
Makah Indian Tribe v. Clallam County, 73 Wash.2d 677, 440 P.2d 442 (1967) 11
Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir. 1957), *cert. denied* 356 U.S. 960 (1958) 9
Maryland Casualty Co. v. Citizens National Bank, 361 F.2d 517 (5th Cir. 1966) 9
McClanahan v. State Tax Commission, 14 Ariz. App. 452, 484 P.2d 221 (1971) ..2, 6, 10, 13-14, 17
McCulloch v. Maryland, 4 Wheat. 316 (1819) 10
Morris v. Hitchcock, 194 U.S. 384 (1904) 10
Oklahoma Tax Commission v. United States, 319 U.S. 598 (1936) 14, 15
Pourier v. Board of Commissioners, 83 S.D. 235, 157 N.W.2d 532 (1969) 11
Sohol v. Clark — Wash.2d —, 479 P.2d 925 (1971) 11
Squire v. Capoeman, 351 U.S. 1 (1956) 18
Stephens v. Cherokee Nation, 174 U.S. 445 (1899) 12
Talton v. Mayes, 163 U.S. 376 (1896) 9
United States v. Daney, 370 F.2d 791 (10th Cir. 1966) ...13, 18
United States v. Forness, 125 F.2d 928 (2d Cir. 1942), *cert. denied sub nom.* City of Salamanca v. United States, 316 U.S. 694 (1942) 13
United States v. Holliday, 3 Wall. 407 (1866) 13
United States v. Kagama, 118 U.S. 375 (1886) 12
United States v. Quiver, 241 U.S. 602 (1916) 9
United States v. Rickert, 188 U.S. 432 (1903) 14

CITATIONS (Continued)

Cases Page

Ward v. Board of County Commissioners, 253 U.S. 17 (1920) 14
Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1956) 3, 12, 18
Williams v. Lee, 358 U.S. 217 (1959) 3, 7, 10, 13, 15
Worcester v. Georgia, 6 Pet. 515 (1832) 3, 8, 12

Federal Statutes and Treaties

18 U.S.C. §1331 13
18 U.S.C. §1360 13
20 U.S.C. §§239-41; 631-45 16
23 U.S.C. §120(a) 16
25 U.S.C. §231 13
25 U.S.C. §§452-55 16
25 U.S.C. §461 15
25 U.S.C. §§1301 *et. seq* 16
25 U.S.C. §1323(b) 16
25 U.S.C. §1326 16
28 U.S.C. §1257(2) 3
Treaty of 1868 between the United States of America and the Navajo Tribe of Indians, 15 Stat. 667 ..... 2, 4, 5, 7
Arizona Enabling Act, 36 Stat. 557 (1910) 5
Act of June 18, 1934, c. 576, §1, 48 Stat. 984 15
Act of August 15, 1953, c. 505, §§6, 7, 67 Stat. 590 7
Act of August 15, 1953, c. 505, 67 Stat. 588, 589 *as amended* by Act of August 24, 1954, c. 910, 68 Stat. 795 ..... 9, 13
Act of August 8, 1958, 72 Stat. 545 13
Pub.L. 85-470, 72 Stat. 834 (1958) 16
82 Stat. 77 (1968) 16

Arizona Constitutional Provisions and Statutes

Arizona Constitution, Art. XX 5

CITATIONS (Continued)

Cases Page

Arizona Revised Statutes
§43-102(a) 3
§43-184(g) 5
§43-186(d) 2
§43-188(f) 5
§43-191 11

Statutes of the Navajo Tribe
1 Navajo Tribal Code, Title 5, §§701-704; 731-34; 761-76; 841-43; 871-73; 901-12 10-11

OTHER AUTHORITIES

Agnew, Spiro, Remarks, Los Angeles Times, Mar. 9, 1971, §1, at 16 cols. 1, 2 17

Comment, *The Indian Battle for Self-Determination*, 58 Calif. L. Rev. 445 (1970) 12

Fannin, Paul, *Indian Education*, 10 Ariz. L. Rev. 661 (1968) 17

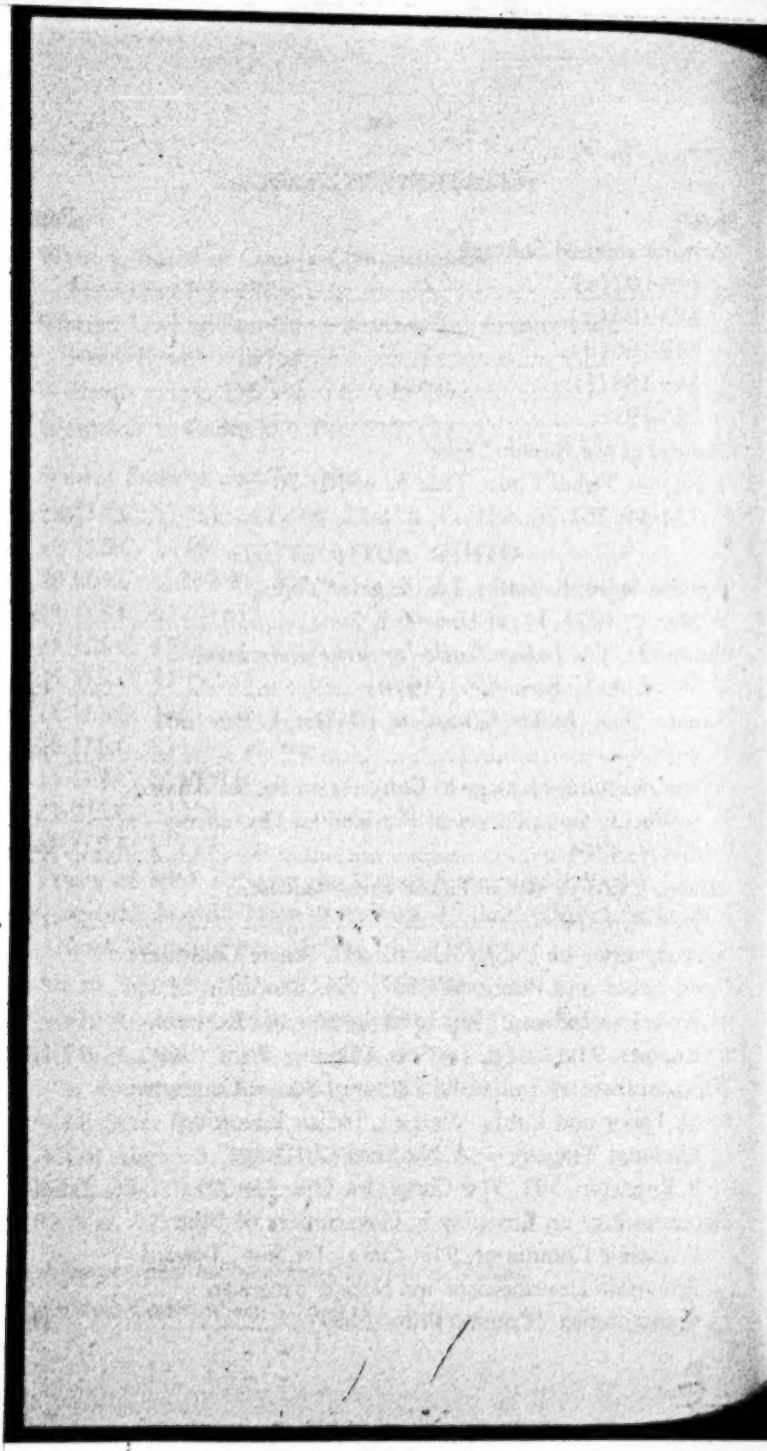
Nixon, Richard, Message to Congress on Indian Affairs, 6 Weekly Compliation of Presidential Documents, 883 (1970) 15

Nixon, Richard, White House Press Release, July 8, 1970 17

Subcommittee on Indian Education of Senate Committee on Labor and Public Welfare, The Education of American Indians, Field Investigation and Research Reports, 91st Cong., 1st Sess. (Comm. Print 1969) 17-18

Subcommittee on Indian Education of Senate Committee on Labor and Public Welfare, Indian Education: A National Tragedy — A National Challenge, S. Rept. No. 501, 91st Cong., 1st Sess. (1969) 17

Subcommittee on Economy in Government of Joint Economic Committee, 91st Cong., 1st Sess., Toward Economic Development for Native American Communities (Comm. Print 1969) 18



IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No._____

ROSALIND McCLANAHAN, on behalf of herself and all others similarly situated, *Appellant*, vs. ARIZONA STATE TAX COMMISSION, *Appellee.*	On Appeal from the Supreme Court of Arizona

JURISDICTIONAL STATEMENT

INTRODUCTORY

Appellant appeals from the judgment of the Supreme Court of Arizona entered on September 21, 1971, which denied appellant's petition for review of the judgment of the Arizona Court of Appeals on April 28, 1971 affirming the dismissal of the appellant's complaint by the Superior Court of the State of Arizona in and for the County of Apache on January 12, 1970. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

THE OPINIONS BELOW

The decision of the Supreme Court of Arizona denying review has not been reported, and appears herein as Appendix A. The opinion of the Arizona Court of Appeals is reported at 14 Ariz. App. 452, 484 P.2d 221, and appears herein as Appendix B. The opinion of the Superior Court is not reported, and appears herein as Appendix C.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is a claim for refund of income tax paid during the calendar year 1967 brought under Ariz. Rev. Stat. Ann. §43-186(d) in the Superior Court of the State of Arizona in and for Apache County. Appellant contends that the assessment, imposition and collection of the Arizona state income is invalid because (1) she is a Navajo Indian; (2) she resided at all material times within the confines of the Navajo Indian Reservation; and (3) her income during 1967 was derived from sources within the Navajo Indian Reservation, making the state statute invalid because it conflicts with the Treaty of 1868 between the United States and the Navajo Tribe. The Superior Court dismissed her complaint, holding that the applicability of the Arizona income tax laws against her was not violative of the federal government's responsibilities as trustee for the Indians nor did it interfere with tribal self-government. On appeal, the Arizona Court of Appeals affirmed the Superior Court's dismissal holding that the Arizona income tax law was validly applied to plaintiff, despite the Treaty of 1868, and the Supreme Court of Arizona denied appellant's petition for review of the judgment of the Court of Appeals.

(ii) The judgment sought to be reviewed is the order of the Supreme Court of Arizona denying appellant's petition for review entered on September 21, 1971. No opinion was filed. The Notice of Appeal was filed in the Superior Court of the State of

Arizona in and for Apache County, the Court possessed of the record, on October 4, 1971.

(iii) Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. §1257(2).

(iv) Cases sustaining the jurisdiction of this Court are:

Kennerly v. Montana District Court, 400 U.S. 423 (1971);

Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965);

Williams v. Lee, 358 U.S. 217 (1959);

The Kansas Indians, 5 Wall. 737 (1867);

Worcester v. Georgia, 6 Pet. 515 (1832);

Cherokee Nation v. Georgia, 5 Pet. 1 (1831).

(v) The validity of Ariz. Rev. Stat. §43-102(a), as applied to appellant, is here involved. The full text of that provision is as follows:

§43-102. Imposition of tax

(a) Taxes and rates — Individuals, estates and trusts. There shall be levied, collected, and paid for each taxable year upon the entire net income of every estate or trust taxable under this title and of every resident of this state and upon the entire net income of every nonresident which is derived from sources within this state, taxes in the following amounts and at the following rates upon the amount of net income in excess of credits against net income provided in §§43-127 and 43-128.

On the first one thousand dollars or any part thereof, two per cent (2%)

On the second one thousand dollars or any part thereof, three per cent (3%)

On the third one thousand dollars or any part thereof, four per cent (4%)

On the fourth one thousand dollars or any part thereof, five per cent (5%)

On the fifth one thousand dollars or any part thereof, six per cent (6%)

On the sixth one thousand dollars or any part thereof, seven per cent (7%)

On the seventh one thousand dollars or any part thereof, and all taxable income in excess of seven thousand dollars, eight per cent (8%).

13 Ariz. Rev. Stat. Ann. (1971-1972 Pocket Part, p. 132).

QUESTIONS PRESENTED

1. Does a state statute which, as applied, imposes and collects taxes from the income of an Indian residing at all times material within the exterior boundaries of the Navajo Indian Reservation, where such income was derived from sources within the Navajo Indian Reservation, violate the Treatry of 1868 between the United States and the Navajo Tribe, 15 Stat. 667?

2. Can the State of Arizona constitutionally apply a statute that imposes and collects taxes from the income of a Indian residing at all times material within the exterior boundaries of the Navajo Indian Reservation, where such income was derived from sources within the Navajo Indian Reservation, without express Congressional authorization?

STATEMENT OF THE CASE

Rosalind McClanahan, appellant herein, is a citizen of the United States and an enrolled member of the Navajo Tribe of Indians. During the 1967 calendar year, appellant resided within the exterior boundaries of the Navajo Indian Reseravtion, on that portion of the Reservation which is within the State of Arizona. Appellant's income during the 1967 calendar year was wholly derived from sources within the confines of the Navajo Indian Reservation. The total amount of tax withheld from appellant's income pursuant to Ariz. Rev. Stat. Ann. §43-188(f) amounted to $16.20. On April 1, 1968, appellant filed an Arizona State Individual Income Tax Return, a written protest against the collection of any tax on appellant's income by appellee, and a claim for refund for the entire sum withheld from her wages. No action was taken on appellant's claim for refund, so on October 4,

1968, appellant appealed her claim to appellee pursuant to Ariz. Rev. Stat. Ann §43-184(g). Appellee took no action on the claim. Thereafter appellant instituted a class action for refund in the Superior Court of Arizona in and for Apache County on June 17, 1969, pursuant to Ariz. Rev. Stat. Ann. §43-186(d). Appellee moved to dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted. Appellee based its position on the following premises: (1) the imposition of the income tax does not interfere with the self-government of the Navajo Tribe of Indians; (2) the Arizona Enabling Act, 36 Stat. 557, 570 (1910) and the Arizona Constitution, Art. XX allow the State of Arizona to tax the income of Indians residing on a reservation; and (3) the Treaty of 1868 between the United States and the Navajo Tribe, 15 Stat. 667, does not contain any provision that would prohibit the imposition of the Arizona state income tax on that portion of the Navajo Indian Reservaion within the boundaries of the State of Arizona.

Appellant in responding to appellee's assertions, contended that (1) absent an Act of Congress, Arizona has no power to tax appellant's income; (2) such arrogation of the income-taxing power by appellee would be violative of the right to self-government conferred on the Navajo Tribe of Indians by the Treaty of 1868; (3) and the Arizona Enabling Act and Article XX of the Arizona Constitution do not deprive the Navajo Tribe of the exclusive power to tax Indians but rather preclude the state of Arizona from applying its income tax laws to Indians residing on the Reservation.

The Superior Court dismissed appellant's complaint on January 12, 1970, holding that the State of Arizona did not require express congressional authority to tax appellant, and that the income tax imposed and collected by appellee did not interfere with tribal self-government. Appellant noticed an appeal to the Court of Appeals of the State of Arizona that same day. The Court of Appeals affirmed the Superior Court's dismissal of the

complain on April 28, 1971, and held that Arizona could validly apply its income tax statute on Indians residing and working on the Navajo Reservation without violating the Treaty of 1868 or the Enabling Act of Arizona. *McClanahan v. State Tax Commission,* 14 Ariz. App. 452, 484 P.2d 221. On May 11, 1971, appellant moved for a rehearing, which was denied on June 8, 1971. Appellant then filed a petition for review by the Supreme Court of Arizona on June 22, 1971, and said petition was denied on September 21, 1971. Appellant filed the Notice of Appeal to the Supreme Court of the United States in the Superior Court, the court possessed of the record, on October 4, 1971.

THE QUESTIONS ARE SUBSTANTIAL

THE FEDERAL QUESTIONS PRESENTED BY THIS CASE COMPEL THE EXERCISE OF THIS COURT'S APPELLATE JURISDICTION BECAUSE THEY AFFECT THE VERY SUBSTANCE OF THE FEDERAL-STATE-INDIAN RELATIONSHIP.

There are approximately 127,054 Navajo Indians of whom 71,396 reside in the Arizona portion of the Navajo Indian Reservation. Letter from Melvin Wise, Chief of the Office of Information and Statistics, Bureau of Indian Affairs, Navajo Area Office, to Donald Juneau, December 16, 1971. The appellee herein, Arizona State Tax Commission, contends that it can tax the incomes of Indians residing on the Reservation where that income is wholly derived from sources on the Reservation. This contention is inconsistent with past decisions of this Court (1) which protect Indian tribal sovereignty, and (2) which debar state interference in Indian affairs because of federal preemption in the field. These two classes of decisions are conceptually and logically related as bases of an expressed federal policy of tribal sovereignty which excludes state action absent specific federal authorization. But to the extent that these interests are separable, the discussion *infra* will be concerned first with Indian tribal sovereignty, and second with federal preemption.

A. TRIBAL SOVEREIGNTY IS VIOLATED BY ARIZONA'S INCOME TAXATION OF RESERVATION INDIANS.

The opinion of the Arizona Court of Appeals upholding appellee's right to tax the income of reservation Indians conflicts with the body of federal case law defining the state-Indian relationship because the Court of Appeals failed to recognize that the taxation in question infringed on the federally-protected right of tribal self-government.

1. The Infringement Test

In *Williams v. Lee*, 358 U.S. 217 (1959), this Court formulated a test to determine the permissible scope of state activities on an Indian reservation. A non-Indian trader brought an action on account against a Navajo Indian in the Arizona Superior Court. The Arizona Supreme Court ruled that the Superior Court had jurisdiction. On certiorari, this Court reversed, and said:

> Essentially, absent governing Acts of Congress, the question has always been whether state action infringed upon the right of reservation Indians to make their own laws and be ruled by them.

359 U.S. at 220. The Court noted the absence of a governing act of Congress in that Arizona had not accepted jurisdiction under the Act of August 15, 1953, c. 505 §§6, 7, 67 Stat. 590. The Court further found that the tribal courts had "broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants." *Id.* at 222 (footnote omitted). It concluded "that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 223.

In defining the parameters of tribal self-government for the purpose of its infringement test the Court relied on the 1868 Treaty between the United States and the Navajos, 15 Stat. 667, and the body of federal case law interpreting the scope of tribal sovereignty. Referring to the 1868 Treaty, the Court stated:

Implicit in these treaty terms . . . was the understanding that

> the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.

Id. at 222. Referring to the body of federal case law, the Court said:

> The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Id. at 223. The proper application of the *Williams* test thus compels a recognition of the many incidents of tribal sovereignty protected by the federal courts.

2. Tribal Sovereignty and the Federal Courts

This Court forcefully acknowledged the existence of tribal sovereignty in the early years of the Republic. In *Worcester v. Georgia*, 6 Pet. 515 (1832) this Court held that Georgia criminal statutes were inapplicable within the boundaries of the Cherokee Nation because "[t]hey are in direct hostility with treaties, repeated in a succession of years, which mark out the boundaries that separate the Cherokee Country from Georgia . . . and recognize the pre-existing power of the nation to govern itself." 6 Pet. at 561, 562. Mr. Chief Justice Marshall, drawing upon his prior characterization of Indian tribes as "domestic dependent nations" in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831), concluded that the Cherokee Nation was "a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . " 6 Pet. at 561.

Cases subsequent to *Worcester* reiterated this Court's commitment to tribal sovereignty. In *The Kansas Indians*, 5 Wall. 737 (1867), the Court considered the conflicting claims of state power and Indian self-government. The State of Kansas asserted its taxing power over lands held in severalty by the Shawnee Indians which had been patented to them by the United States. The Court held that as long as the Kansas Indians existed as separate political entities, exercising the powers of self-government vested in them by their treaties with the United States, they would "enjoy the privilege of total immunity from state taxation." *Id.*

at 756. In *Ex Parte Crow Dog*, 109 U.S. 556 (1883), this Court affirmed another aspect of tribal sovereignty, holding that the Dakota territorial court did not have jurisdiction over an Indian for an alleged murder of another Indian in the Indian country. The criminal and civil jurisdiction was vested by the treaties in the Indian Tribes, giving the Indians "the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs." 109 U.S. at 568. The Court also upheld tribal sovereignty over domestic relations, *United States v. Quiver*, 241 U.S. 602 (1916), and individual rights, *Talton v. Mayes*, 163 U.S. 376 (1896).

Last term, this Court again sustained Indian tribal sovereignty against state encroachment in *Kennerly v. Montana District Court*, 400 U.S. 423 (1971). The Court held that absent a vote by the members of the Blackfeet tribe and affirmative legislative action by the State of Montana, the state could not assume jurisdiction over the Blackfeet reservation under the Act of August 15, 1953, 67 Stat. 589.

Following the lead of this Court the lower federal courts have consistently sustained tribal sovereignty. *See, e.g., Maryland Casualty Co. v Citizens National Bank*, 361 F.2d 517 (5th Cir. 1966); *Littell v. Nakai*, 344 F.2d 486 (9th Cir. 1965), *cert. denied* 382 U.S. 986 (1966); *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957), *cert. denied* 356 U.S. 960 (1958); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956).

The most recent example of the forthright adherence of the federal courts to the priciples of protected tribal sovereignty formulated by this Court is *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), *cert. denied* 396 U.S. 1003 (1970). In *Turtle*, the Ninth Circuit held that Arizona had no authority to extradite to Oklahoma an Indian living on the Arizona portion of the Navajo reservation. The Navajo Tribe was the only gov-

ernment with the power of extradition over Indians within the reservation boundaries. Analogizing the Tribe's extradition power to that of a state government, the court stated that the "power cannot now be assumed by or shared with the State of Arizona without "infring[ing] on the right of reservation Indians to make their own laws and be ruled by them.' . . ." 413 F.2d at 686.

Despite the unbroken line of authority going back over a hundred years, the Arizona Court of Appeals held that Arizona could validly extend its income tax laws over Indians residing and working on the Navajo Reservation. The Court misapplied the *Williams* test by stating that "the infringement referred to in *Williams v. Lee* . . . is not whether the Arizona state income tax infringes upon plaintiff's rights as an individual Navajo Indian, but whether such a tax infringes on the rights of the Navajo Tribe of Indians to be self-governing." 14 Ariz. App. at 454, 484 P.2d at 223. By finding that the income tax is an individual, personal matter, the court maintained that the paying of the income tax was not "an infringement of the Navajo Tribe's right of self-government." 14 Ariz. App. at 454, 484 P.2d at 223. By finding that the income tax is an individual, personal matter, the court maintained that the paying of the income tax was not an infringement of the Navajo Tribe's right of self-government. The maintenance of such a position is clearly untenable in light of the broad interpretation of tribal sovereignty by the federal courts.

Since the power to tax is an attribute of sovereignty, "essential to the very existence of government," *McCulloch v. Maryland*, 4 Wheat. 316, 428 (1819), it follows that an Indian tribe possessing the powers of self-government may levy and impose taxes. *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Iron Crow v. Oglala Sioux Tribe, supra; Buster v. Wright*, 135 F.947 (8th Cir. 1905), *appeal dismissed* 203 U.S. 599 (1906.) Although the Navajo Tribe has imposed license and privilege taxes, *see* 1 Navajo Tribal Code, Title 5, §§ 701-704; 731-734; 761-776; 841-843;

871-873; 901-912; no income tax has yet been enacted. This does not mean that the tribe has irrevocably waived or conveyed its taxing power to the State of Arizona. *Cf. Arizona ex. rel. Merrill v. Turtle, supra.* In addition, the question inevitably arises as to how Arizona proposes to collect delinquent taxes, pursuant to Ariz. Rev. Stat. Ann. § 43-191. *Cf. Commissioner of Revenue v. Brun,* 286 Minn. 43, 53, 174 N.W. 2d. 120, 126 (1970). Appellee's attempt to levy and collect income taxes on Indians living and working on the Navajo Reservation is a clear and direct infringement of Navajo Tribal Sovereignty, prohibited by *Williams v. Lee, supra.* Under an unbroken line of cases extending from *Worcester* to *Kennerly,* this Court has barred similar attempts to dilute or destroy such sovereignty.

Moreover, various state courts have followed this Court's lead in barring state taxation of Indian lands. *See, e.g., Sohol v. Clark,* ..... Wash. 2d ....., 479 P.2d (1971); *Pourier v. Board of Commissioners,* 83 S.D. 235, 157 N.W. 2d 532 (1969); *Makah Indian Tribe v. Clallam County,* 73 Wash. 2d 677, 440 P.2d 442 (1967). In the only other instance where a state supreme court considered the question of state income taxation of reservation Indians, the Minnesota Supreme Court delivered a well-reasoned opinion denying the state the power to extend income taxation onto an Indian Reservation. *Commissioner of Revenue v. Brun, supra.*

B. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE WELL-SETTLED DOCTRINE OF FEDERAL PREEMPTION IN THE AREA OF INDIAN AFFAIRS BECAUSE THE COURT UPHELD THE TAX IN QUESTION ABSENT ANY SHOWING OF EXPRESS CONGRESSIONAL AUTHORIZATION FOR ARIZONA TO LEVY AND COLECT STATE INCOME TAX FROM RESERVATION INDIANS.

It is an axiom of federal Indian law that Congress possesses "plenary power of legislation" with respect to Indian tribes.

Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899). Congressional plenary power derives from the Constitution, *Worcester v. Georgia,* 6 Pet. 515, 559 (1832); the "guardianship" of the United States over Indians, *Cherokee Nation v. Georgia,* 5 Pet. 1, 12 (1831); and the federal "ownership" of Indian land, *Johnson & Graham's Lessee v. McIntosh,* 8 Wheat. 240, 261 (1823). *See* Comment, *The Indian Battle for Self-determination,* 58 Calif. L. Rev. 445, 447-52 (1970). These sources of federal plenary power over Indian affairs have been buttressed by the moral obligation of the federal government recognized by this Court in *United States v. Kagama,* 118 U.S. 375 (1886):

> [The Indian Tribes] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

118 U.S. at 384.

Where Congress acts pursuant to its plenary authority over Indian affairs, state action is absolutely precluded. In *Warren Trading Post Co. v. Arizona Tax Commision,* 380 U.S. 685 (1965), this Court held that Arizona could not tax the gross sales income of a trading post located on the Arizona portion of the Navajo Reservation. Finding that a comprehensive scheme of statutes and regulations had been set up in order to regulate traders, the Court stated:

> These apparently all inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.

Id. at 690.

Where *Warren,* drawing upon the long standing doctrine of federal preemption, forecloses state action where Congress has

acted, *Williams, supra,* controls state action in Indian affairs where Congress is silent. The *Williams* test precludes state action in the absence of "governing Acts of Congress," 358 U.S. at 220, where, as here, state action infringes upon tribal sovereignty.

State governments are thus clearly limited in their authority over Indian affairs to those areas specifically granted to the states by Congress. *See Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903). Only Congress can alter established federal Indian policy, *United States v. Daney,* 370 F.2d 791, 795 (10th Cir. 1966), and a state cannot *sua sponte* assert its jurisdiction over an Indian by conferring state citizenship and the right of suffrage upon him. *The Kansas Indians, supra* at 757; *United States v. Holliday,* 3 Wall. 407, 419 (1866).

Congress has granted the states jurisdiction in limited areas,[1] *see, e.g.,* 25 U.S.C. § 231 (health care); and has granted certain enumerated states civil and criminal jurisdiction by affirmative legislative action. Act of August 15, 1953, c.505, 67 Stat. 588, 589, *as amended* by the Act of August 24, 1954, c.910, 68 Stat. 795; Act of August 8, 1958, 72 Stat. 545, *amending* 18 U.S.C. §§ 1331, 1360. Arizona is not one of the enumerated states, and it has undertaken no affirmative legislative action to assume jurisdiction over the Arizona portion of the Navajo Reservation.

In justifying the tax in question here, a tax that directly infringes on the sovereignty of the Navajo Tribe; the obligation clearly rests with the state of Arizona to show congressional authorization for the state's action. It is significant that the court below did not cite any specific congressional act in support of Arizona's tax of reservation Indian income. The court of appeals dismissed *Warren,* stating that it found "no corresponding preemption of

---

[1] Where Congress does allow a state to exercise limited jurisdiction on an Indian Reservation, such exercise is strictly construed in favor of the Indians. *United States v. Forness,* 125 F.2d 928 (2d Cir.) *cert. denied sub nom. City of Salamanca v. United States,* 316 U.S. 694 (1942). *Cf. Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631 (1970); *Choate v. Trapp,* 224 U.S. 665, 675 (1912).

the field of taxation by Congress to make this reasoning germaine to the taxation of Navajo Reservation Indians by the State of Arizona." 14 Ariz. App. at 455, 484 P.2d at 225. The court thus overlooked the clear *Williams'* requirement of affirmative congressional authorization and assumed that silence bespeaks consent despite the well-settled principle of federal law that the non-exercise of power in a field preempted by the federal government forecloses state action in that field absent express congressional authorization. *Guss v. Utah Labor Board*, 353 U.S. 1 (1957).

The absence of congressional authorization for state taxation of Indians is especially significant in view of the wide variety of state taxation of Indian property struck down by this Court. *Board of Commissioners v. Seber*, 318 U.S. 705 (1943) (real estate tax on trust lands); *Carpenter v. Shaw*, 280 U.S. 363 (1930) (tax on allottees' oil and gas royalties); *Ward v. Board of County Commissioners*, 253 U.S. 17 (1920) and *Choate v. Trapp*, *supra*, (real property tax on allotments); *United States v. Rickert*, 188 U.S. 432 (1903) (tax on fixed and permanent improvements on allotted lands).

The two cases cited by the lower court as authority for state taxing power over Indians, *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1936), and *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936), dealt with situations that are totally distinguishable from the situation of members of the Navajo Tribe. *Leahy* upheld a state income tax on the tribal income of an Osage Indian. The Court's opinion was perfunctorily based up on *Choteau v. Burnet*, 283 U.S. 691 (1931), a case upholding federal income tax on the income of a tribal Indian. The *Choteau* holding turned on two central factors that are inapplicable given the present situation of tribal Indians.

First, at the time *Choteau* was decided, federal Indian policy was conducted pursuant to the assimiliationist Indian Allotment Act. The *Choteau* Court found that federal policy contemplated

Indians becoming land-owning citizens and taxpayers of the United States:

> The course of legislation disclosed that the plan of the government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for complete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon him both the responsibilities and the privileges of the owner of property including the duty to pay taxes.

283 U.S. at 694. The assimilationist policy that persuaded the Court in *Choteau* and in turn provided the basis for the *Leahy* case no longer exists. Act of June 18, 1934, c. 576, § 1, 48 Stat. 984, 25 U.S.C. § 461 (1964). The allotment system has been repudiated by the President of the United States. Indian Affairs, The President's Message to the Congress, 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 883 (1970).

Second, the Indian involved in both the *Choteau* and *Leahy* cases held a trust patent, the trust on which had run under federal law. He thus became obligated to pay federal tax by the terms of his trust patent itself. This situation, also pivotal in *Choteau* and *Leahy*, is far removed from the situation of the vast majority of Navajos.

In *Oklahoma Tax Commission*, this Court, in upholding an Oklahoma state estate tax levied on restricted Indian personal property, carefully pointed out the special situation of the Oklahoma Indians involved in the case. 319 U.S. at 603-604. The Court found little effective tribal government; all of the benefits of government were provided by the State of Oklahoma, therefore the Indians should pay for the benefits the state provided. *Id.* at 609. The case was decided wholly on a benefit-burden theory of taxation, a theory inapplicable to the Navajo Tribe. The Navajo Tribe has an effective court system, recognized by this Court, *see Williams v. Lee*, *supra*, at 222, that alleviates state court calendars with no cost to the state. The Tribe has its

own police force (the largest tribal force in the United States), its own anti-poverty office (Office of Navajo Economic Opportunity), and its own welfare program (emergency relief and chapter-sponsored work projects). Many other endeavors are either aided or wholly underwritten by the federal government.[2] The *ratio decidendi* of the two cases cited by the Arizona Court of Appeals thus does not contemplate the situation presented by the case at bar.

Not only has Congress not authorized *sub silentio* Arizona to tax the income of Navajos living and working on the reservation, but recent congressional legislation evidences a clear intent to strengthen Indian tribes, encourage the type of tribal activities mentioned above, and assist them in their struggle for self-determination. This recent legislation is the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. §§ 1301 *et seq.* Last term, this Court construed §§ 403 and 406(b) of the Act, Stat. 79, 80, 25 U.S.C. §§ 1323(b) and 1326, in *Kennerly v. Montana District Court*, 400 U.S. 423 (1971). In *Kennerly*, the Court found that Montana had not affirmatively assumed civil jurisdiction over the Blackfeet Reservation. Nor had the Blackfeet Tribal Council conferred upon Montana civil jurisdiction over the reservation by enacting a resolution declaring that the state courts of Montana had concurrent jurisdiction with the Tribal Courts. The Court held that a referendum of tribal members was required to confer such jurisdiction under the Indian Civil Rights Act, *supra*, and "[l]egislative action by the Tribal Council does not comport with the explicit requirements of the Act." 400 US. at 429 (footnote omitted). The Navajo Tribe has not even raised the possi-

---

[2] *E.g.*, most of the roads on the reservation are maintained by the Tribe and the Bureau of Indian Affairs, and state schools serving Indians are substantially financed by federal money. *See* 25 U.S.C. §§452-455 (Johnson-O'Malley Act); 20 U.S.C. §§239; 631-645 (Impact Aid for schools); Pub.L. 85-470, 72 Stat. 834 (1958) (highways); 23 U.S.C. §120 (a) (95% of highway costs on Indian Reservations paid by federal government).

bility of concurrent state jurisdiction, much less seriously considered a referendum on the question.

CONCLUSION

The federal questions presented by the Arizona Court of Appeals decision in *McClanahan v. State Tax Commission* concern the very existence of Indian tribal government within the federalist system. The foregoing analysis shows that the lower court's opinion directly controverts the unbroken line of decisions wherein this Court has preserved Indian tribal sovereignty and sustained federal preemption in Indian affairs. What is a stake here is more than an abstract principle of political science. The self-governing Indian tribes require protection if they are to fully determine their economic destinies.

The vision of Indian self-government remains the one bright light in the history of the United States' dark history in dealing with the first Americans, a history all too often punctuated with perfidy by the government of this nation. Through the years, often in times of deep public antipathy toward the Indian, this Court, indeed the entire federal judiciary, has championed that vision of self-government. Indians have lately found additional exponents of self-determination in the executive branch[3] and in Congress,[4]

---

[3] President Nixon said on July 8, 1970: "This then, must be the goal of any new national policy towards the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community." White House Press Release, p. 2. Vice President Agnew, on March 8, 1971, said: "We in this Administration believe in giving you control over what you have. The reservations are your lands. The lives you lead on them are your lives. The federal government has obligations to provide financial support. But you should establish the priorities, you should allocate the funds, you should guide the projects * * *." Los Angeles Times, Mar. 9, 1971, §1, at 16, cols. 1, 2.

[4] *See, e.g.*, Fannin, *Indian Education*, 10 Ariz. L. Rev. 661 (1968); Subcommittee on Indian Education of the Senate Committee on Labor and Public Welfare, Indian Education: A National Tragedy—A National Challenge, S. Rept. No. 501, 91st Cong., 1st Sess. 9-21 (1969); Subcommittee on Indian Education of Senate Committee on Labor and Public Welfare, The Education of American Indians, Field Investigation and

but they still look to this Court for assurance that the vision will remain a reality.

In order to grow and progress, Indian tribes need revenue for education and economic development. The intrusion of a state into the Indian taxing sphere would make it that more difficult for a tribe to secure its needed revenue. In view of the grinding poverty on Indian reservations, treble taxation by federal, state and tribal governments would be an insupportable burden on the Indian taxpayer. *See Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 690 (1965). The federal courts have recognized the need for easing the tax burden on Indians by affording them federal tax exemptions. *See, e.g., Squire v. Capoeman* 351 U.S. 1 (1956) (no capital-gains tax on proceeds from sale of timber on allotted land); *United States v. Dancy*, 370 F.2d 791 (10th Cir. 1966) (no income tax on bonus given Indian for oil and gas lease on allotted land); *Big Eagle v. United States*, 300 F.2d 765 (Ct. Cl. 1966) (no income tax on royalty income from tribal mineral deposits). The purpose of tax exemptions is to encourage the tribal Indians to become self-sufficient in the development and use of resources of the reservation. *Donahue v. California Justice Court*, 15 Cal. App.3d 579, 93 Cal. Rptr. 310 (1st Dist. 1971). This self-sufficiency is imperilled by Arizona's attempt to collect income taxes of Indians living and working on the Navajo Reservation, and plaintiff asks this court on behalf of her people to protect the Tribe's sovereignty — a duty which has invariably been recognized "by this court whenever the question has arisen." *United States v. Kagama*, 118 U.S. 375, 384 (1886).

Research Reports, 91st Congress, 1st Sess. (Comm. Print 1969); Subcommittee on Economy in Government of the Joint Economic Committee, 91st Cong., 1st Sess., Toward Economic Development for Native American Communities (Comm. Print 1969).

Respectfully submitted,

DONALD JUNEAU
THEODORE R. MITCHELL
Attorneys for Appellant

Dated: December, 1971

Of Counsel:
BRUCE BRIDEGROOM
STEPHEN HARVEY

APPENDIX A

SUPREME COURT

STATE OF ARIZONA

PHOENIX

85007

September 22, 1971

ROSALIND McCLANAHAN, Individually and On Behalf of All Others Similarly Situated, Appellant, vs. THE STATE TAX COMMISSION OF ARIZONA, Appellee.	No. 10576-PR (Supreme Court) No. 1 CA-CIV 1316 (Court of Appeals) No. 4370 (Apache County)

The following action was taken by the Supreme Court of the State of Arizona on September 21, 1971 in regard to the above-entitled cause:

"ORDERED: Petition for Leave to File Amicus Curiae Brief — GRANTED.

FURTHER ORDERED: Petition for Review — DENIED."

Record returned to the Court of Appeals, Division One, this 22nd day of September, 1971.

CLIFFORD H. WARD, Clerk

APPENDIX B

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

1 CA-CIV 1316
DEPARTMENT B

Appeal from the Superior Court of Apache County

Cause No. 4370

The Honorable D. L. Greer, Presiding

AFFIRMED

Dinebeiina Nahiilna Be Agaditahe — Window Rock

By Theodore Mitchell
Bruce Bridegroom
Donald Juneau

Attorneys for Appellant
Gary K. Nelson, — Phoenix

The Attorney General
By James D. Winter,
Assistant Attorney General

Attorneys for Appellee
JACOBSON, Presiding Judge

Are Navajo Indians, living and working within the confines of that portion of the Navajo Indian Reservation lying within the State of Arizona, subject to the Arizona State Individual Income Tax laws?

Plaintiff-appellant, Rosalind McClanahan, brought an action

in Apache County, Arizona, on behalf of herself and all others similarly situated,[1] against the State Tax Commission of Arizona, seeking a refund of $16.20 withheld by her employer during the taxable year of 1967 as Arizona income tax, against which the State of Arizona claimed an alleged tax liability of $11.84. Plaintiff's complaint alleged that she is a Navajo Indian and that at all times during the tax year 1967 she resided on, and all her income for that year was derived from sources within the confines of, the Navajo Indian Reservation. By reason of her status and the source of her income, plaintiff contends he is not subject to the assessment, collection or retention of the Arizona tax on income collected under the authority of ARS § 43-101 et seq.[2]

The defendant State Tax Commission filed a motion to dismiss for failure to state a claim for relief pursuant to Rule 12(b), Rules of Civil Procedure, which was granted. Plaintiff appealed from the judgment of dismissal of her complaint.

For the purposes of this appeal, we must consider the facts pled in plaintiff's complaint as true. Lakin Cattle Co. v. Engelthaler, 101 Ariz. 282, 419 P.2d 66 (1966).

Plaintiff does not contend that she is not a "resident" of the State of Arizona, within the meaning of the Arizona state tax law, but bases her theory of non-taxability by the State of Arizona primarily upon the oft-quoted pronouncement of the United States Supreme Court in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832):

"The Cherokee (Navajo) Nation . . . is a distinct community occupying its own territory . . . in which the laws of Georgia (Arizona) can have no force."

---

[1] It not being necessary for a determination of the issues in this matter to determine whether plaintiff may properly under our statutes maintain this as a class action, we decline to do so. *See* Rule 23, Ariz. R. Civ. P.

[2] ARS §43-102 A, as amended, provides in part:

"There shall be levied, collected, and paid for each taxable year upon the entire net income of . . . every resident of this state . . . taxes in the following amounts . . . "

However, it is generally conceded, even by the plaintiff here, that the relationship of the Indian, be he reservation oriented or otherwise, to the rest of the citizens of the United States and to the states themselves, has drastically changed in the approximate 140 years since Worcester v. Georgia. This changed relationship has been reflected in decisions delineating the State-Indian status.

> "Over the years this original concept of tribal sovereignty has been modified to permit application of state law to reservation Indians in matters not considered essential to tribal self-government, but the basic principle that the Indian tribes retain exclusive jurisdiction over essential matters of reservation government, in the absence of specific Congressional limitation, has remained." Arizona v. Turtle, 413 F.2d 683 (9th Circuit 1969), cert. denied, 396 U.S. 1003, 24 L.Ed. 2d 1494 (1970). (emphasis added).

To determine the effectiveness of state laws on reservation Indians ". . . the question has always been whether the state action infringed on the right of the Reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959). Williams also speaks in terms of "the internal affairs of the Indians" remaining "exclusively" within the jurisdiction of the tribal government.

It is also apparent from reading the State-Indian cases, that the extent of control that a state may exercise over Indians residing within its borders is in direct relationship to the amount of tribal government in existence which could affect that Indian. Thus, in Leahy v. State Treasurer of Oklahoma, 297 U.S. 420, 56 S. Ct. 507, 80 L. Ed. 771 (1936) and in Oklahoma Tax Commission v. United States, 319 U.S. 598, 63 S. Ct. 1284, 87 L. Ed. 1612 (1943), the State of Oklahoma was allowed to impose a state tax on a pro rata share of tribal income and an estate tax on Indians' estates where "these Indians have no effective tribal autonomy . . . and . . . are actually citizens of the State with little to distinguish them from all other citizens except for their

limited property restrictions and their tax exemptions." Oklahoma Tax Commission v. U. S., supra.

Likewise, Alaska state fishtrap laws were applied to the Metlakatla Indians who have no reservation in the self-government sense because "the principle of Indian national sovereignty enunciated in Worcester v. Georgia . . . does not apply to them." Metlakatla Indian Community v. Egan, 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962).

A like result was reached in Organized Village of Kake v. Egan, 369 U.S. 60, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962), dealing with non-reservation Indians.

Applying the rationale of these decisions it is apparent that the infringement referred to in Williams v. Lee, supra, is not whether the Arizona state income tax infringes on plaintiff's rights as an individual Navajo Indian, but whether such a tax infringes on the rights of the Navajo Tribe of Indians to be self-governing. In making this determination, we must first make an analysis of the nature of a net income tax. A workable analysis was first expressed in Black on Income and Other Federal Taxes (Fourth Edition) as quoted in Poorman v. State Board of Equalization, 99 Montana 543, 45 P.2d 307 (1935):

"'An income tax is distinguished from other forms of taxation in this respect: that it is not levied upon property, nor upon the operations of trade or business or the subjects employed therein, nor upon the practice of a profession or the pursuit of a trade or calling, but upon the acquisitions of the taxpayer arising from one or more of these sources, or all combined, annually or at other stated intervals, and generally, but not necessarily, upon only the excess of such acquisitions over a certain minimum sum.'"

An income tax has been said to be a personal tax, Pennsylvania Cement Co. v. Bradley Contracting Co., 274 F. 1003 (S.D.N.Y. 1960), assessed upon the income of the person. Young v. Illinois Athletic Club, 310 Ill. 75, 141 N.E. 369 (1923).

Because of the nature of a net income tax we are not per-

suaded by the reasoning of those cases dealing with the attempt by the state to control or affect Indian real property. See The Kansas Indians, 72 U.S. (5 Wall.) 737, 18 L. Ed. 667 (1866); Your Food Stores, Inc. (NSL) v. Village of Espanola, 68 N.M. 327, 361 P.2d 950 (1961).

Having previously determined that the prohibition against applying state law to reservation Indians was not intended as a prohibition against individual infringement, but deals with interference with tribal autonomy we have no difficulty in holding that the fact that the plaintiff is a Navajo Indian and is required to pay a personal tax, does not in and of itself make such a tax ineffective. Nor do we believe the fact that plaintiff as a Navajo Indian is required to pay the income tax on income derived solely from sources within the reservation results in an infringement on the Navajo tribe's right of self government. In determining whether such an infringement exists, we are aded by an examination of those early cases dealing with the federal-state dichotomy of income taxation. Thus, as was held in Helvering v. Gerhardt, 304 U.S. 405, 58 S. Ct. 969, 82 L. Ed. 1427 (1938), when dealing with the problem of whether state employees were required to pay federal income taxes and the extent that such taxation infringed upon the sovereignty of the state:

> "Even though, to some unascertainable extent, the tax deprived the state of the advantage of paying less than the standard rate for the services which they engaged, it does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states.
>
> "[W]e decide only that the present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state government." (emphasis added)

Likewise, the corresponding right of a state to levy an income tax upon an employee of the federal government was upheld in Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 59 S. Ct. 595, 83 L. Ed. 927 (1939). This case, in attempting to deter-

mine whether the State income tax infringed upon the sovereignty of the Federal Government, stated:

"The present tax is a non-discriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the (United States Government), or its property or income, nor is it paid by the . . . government from their funds. It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable (citations omitted)." (emphasis added)

If then, an income tax by the Federal Government or a state upon the employee of the other does not interfere with the essential function of the government whose employee is being taxed, how can it be seriously argued that an income tax by the State of Arizona upon a Navajo Indian, regardless of his employer, causes an impairment of the right of the Navajo tribe to be self governing? We believe it cannot. Nor are we dissuaded from this proposition by Warren Trading Post Co. v. Arizona State Tax Comm., 380 U.S. 685, 85 S. Ct. 1242, L. Ed. 2d 165 (1965) relied upon by plaintiff. This case held that the State of Arizona could not impose a gross sales tax upon the privilege of operating a trading post within the confines of the Navajo Reservation. In our opinion, the rationale of that decision was that the Federal Government by licensing Indian traders and regulating them "has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." We find no corresponding preemption of the field of taxation by Congress to make this reasoning germane to the taxation of Navajo reservation Indians by the State of Arizona.

Plaintiff likewise argues that the Arizona Enabling Act (§ 20, 36 Stat. 569) and the Arizona Constitution (Art. XX, Fourth)

require a ruling that Navajo Indians are not subject to Arizona State income taxes. The language of the Enabling Act and the Constitution is the same and is as follows:

> "The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall be been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

We do not believe that this language defeats the tax in question for two reasons. First, the prohibition deals with disclaimer of title to land owned or held by an Indian or an Indian tribe, and as we have previously discovered, an income tax is not a tax on real property. By the imposition of the income tax here involved, the State of Arizona is not asserting any ownership or proprietary interest in Indian lands. Second, as was pointed out in Organized Village of Kake v. Egan, 369 U.S. 60, supra, the "absolute jurisdiction and control" language of the Act and Constitution was "not intended to oust the state completely from regulation of Indian 'property' . . ." Thus "state laws may be applied to Indians unless such application would interfere with reservation self government or impair a right granted or reserved by federal law," 369 U.S. at 75, regardless of the prohibition and disclaimer language of the Constitution and Act.

This then brings us to the two jurisdictions which have been faced with this exact problem. In Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002 (1969), the New Mexico Court of Appeals held that the State of New Mexico could validly tax the income of reservation Indians earned on the reservation. However in that decision the parties stipulated that the tax involved would not constitute an infringement upon tribal rights. Therefore, while we agree with a great deal of what is stated in that

opinion, we do not find the decision of great assistance in resolving the issues at hand.

The Supreme Court of Minnesota in the case of the Commissioner of Taxation v. Brun, 286 Minn. 43, 174 N.W.2d 120 (1970) came to exactly the opposite conclusion, holding that the State of Minnesota could not impose its income tax on a member of the Red Lake Band of Chippewa Indians who was employed at a tribal sawmill within the confines of the Reservation. On the crucial issue of infringement the Court held:

"It cannot be argued that siphoning off part of the earnings from employees of a sawmill operated for the benefit and welfare of enrolled members of the tribe does not interfere with the tribal rights of self-government.

Apparently the Minnesota Court is either holding that an income tax is a tax on the source of income, which has been expressly discredited or it is assuming that an income tax is a tax on property, which is also incorrect. In any event, the mere statement that an income tax is an infringement, without analyzing the issue, does not make it so. For this reason we disagree with the Minnesota Court.

At time of oral argument counsel for plaintiff conceded that tax monies of the State of Arizona were being expended for education and welfare within the confines of the Navajo Reservation and that Navajo Indians were the beneficiaries of these expenditures. This fact is mentioned merely to point out that one of the fundamental concepts of governmental sovereignty is the obligation to provide services with the corresponding right to tax its "residents" to pay therefor.

For the reasons herein stated, it is our opinion that because of the nature of an income tax, its imposition upon income earned by a reservation Indian from sources within the reservation is not an infringement of the right of self- government by the tribe of which the taxpayer is a member and therefore such a tax is a

valid exercise of a state law within the confines of the Indian reservation.

The judgment of the trial court is affirmed.

EINO M. JACOBSON, Presiding Judge

CONCURRING:

LEVI RAY HAIRE, Judge

MORRIS ROZAR, Judge of the Superior Court

NOTE: Judge William E. Eubank, having requested that he be relieved from consideration of this matter, Judge Morris Rozar, Maricopa County Superior Court, was called to sit in his stead and participate in the determination of this decision.

APPENDIX C

IN THE SUPERIOR COURT
IN AND FOR APACHE COUNTY
STATE OF ARIZONA

No. 4370

ROSALIND McCLANAHAN, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

THE STATE TAX COMMISSION OF ARIZONA,

Defendant.

(Filed: January 23, 1970)

AMENDED OPINION AND ORDER

The right of the State of Arizona to tax members of the Navajo Tribe has returned like Banquo's ghost to challenge this Court. Indeed, to be resolved are some fundamental questions concerning the relationship of the Navajo Tribe members to this Sovereign State.

In her complaint, Plaintiff alleges that she is a Navajo Indian, residing on the Navajo Indian Reservation; that during the year 1967 the State of Arizona taxed her income — income derived from sources within the Reservation. Plaintiff also alleges residence in Apache County, Arizona.

Defendant has filed its Motion to Dismiss; for purposes of this Motion the facts as alleged are taken to true. *Lakin Cattle Co. v. Engelthaler*, 101 Ariz. 282, 419 P.2d 66.

In *Warren Trading Post v. The Arizona Tax Commission*, 380 U.S. 685, 14 L. Ed. 2d 165, 85 S. Ct. 1242, Justice Black while holding the Arizona State Tax Commission powerless to impose a sales tax against a trader on the Navajo Reservation, discussed grants made by the United States Government for its wards, for roads, education, and other services, and further stated:

> "Since Federal legislation has left the State with no duties or responsibilities respecting the Reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax".

It is therefore appropriate, preliminarily, to discuss provisions made by the State of Arizona for its Navajo residents in Apache County.

Navajo Tribal members who are residents of Arizona are entitled to all benefits to which other residents are entitled. His right to bear arms and to consume alcoholic beverages has been recognized and affirmed by recent legislation. His right to sue in State courts was determined in *Begay v. Sawtelle*, 53 Ariz. 304 (1939), 88 P.2d 999. By *Fernandez v. State*, 16 Ariz. 269, 144 Pac. 640 (1914), the Indian living on a Reservation was adjudged to be competent as a witness in judicial proceedings. In *Bradley v. Arizona Corporation Commission*, 60 Ariz. 508 (1943), 141 P.2d 524, the Supreme Court of Arizona upheld the constitutional right of a tribal Indian to sue and obtain a certificate of convenience and necessity for operation of a motor vehicle as a contract carrier.

The zenith of Arizona judicial responsibility arrived in *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456, when Justice Udall, who presided in this Court for many years, held, in reversing *Porter, v. Hall*, 34 Ariz. 308, 271 P. 411 (1928), that a tribal Indian could vote in State and Federal elections. The case also affirmed that Indian tribes residing on Indian Reservations are residents of the State of Arizona. In every term of this Court many Navajos are called in to serve as jurors.

No cases have been cited holding that the State may not impose an income tax on the Plaintiff.

The thrust of the Defendant's argument is twofold: (1) Arizona has not power to tax income of the Plaintiff absent an Act of Congress expressly confering such power, and (2) the State has no power to tax the income of Plaintiff because to do so would interfere with the powers essential to self-government of the Navajo Tribe.

We have reviewed all the authorities cited by counsel, and have made additional research, and find that the best summary of all the U.S. Supreme Court decisions affecting the case at bar is *State of Arizona ex rel Edgar Merrill v. Wayne Turtle*, 413 F.2d 683 (9th Cir., 1969), wherein Judge Madden stated,

"The relationship between the Navajo Tribe, the United States and the State of Arizona has previously been considered by the Supreme Court in *William v. Lee*, 358 U.S. 217 (1959) and by this court in *Littell v. Nakai*, 344 F.2d 486 (9th Cir. 1965). The history reviewed by the courts in these cases discloses that historically the Indian tribes were regarded as distinct political communities, protected by treaty from the laws of any state and subject only to the plenary power of Congress over Indian affairs. See *Worcester v. Georgia*, 31 U.S. 515 (1832); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *United States v. Kagama*, 118 U.S. 375 (1886). Over the years this original concept of tribal sovereignty has been modified to permit application of State law to reservation Indians in matters not considered essential to tribal self-government, but the basic principal that the Indian tribes retain exclusive jurisdiction over essential matters of reservation government in the absence of specific Congressional limitation, has remained. 'Essentially, absent governing Act of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them'." 413 F.2d at 684.

* * *

"As indicated above, the historical development of this principle down to its contemporary formulation in *Williams* pro-

hibits the State of Arizona in the absence of specific Congressional authorization from extending its laws or process to the Navajo Reservation if to do so would interfere with tribal self-government or impair a right granted by federal law". 413 F.2d at 685.

As similarly stated in *Organized Village of Kake v. Egan*, 369 U.S. 60, 7 L. Ed. 2d 573, 82 S. Ct. 562 (1961),

"[I]'n the absence of a limiting treaty obligation or congressional enactment, each State had a right to exercise jurisdiction over Indian Reservations within its boundaries". 369 U.S. at 75, as quoted from another case.

From an examination of *Turtle*, and the cases therein cited, we conclude that the State does not require express congressional authority to exercise jurisdiction over Plaintiff.

The second point raised is whether, by taxing Plaintiff, the state interferes with self-government of the Navajo Tribe or rights reserved by Federal law. In *Brun v. Commissioner of Taxation*, Docket No. 1375, dated April 22, 1968, the tax court of Minnesota held that a number of the Red Lake Band of Chippewa Indians employed at a sawmill on said reservation, over which the State had no civil or criminal jurisdiction, was liable for payment of State income tax imposed by Minnesota. The Court held,

"It is the opinion of this Court that Minnesota does have sufficient jurisdiction over the Red Lake Reservation and the Red Lake Band of Chippewa Indians to levy State income taxes on income earned by members of the Band from employment on the Reservation. *In regard to the particular appellant, it is further our opinion that the imposition of State income taxes would not interfere with Tribal self-government*". (Emphasis supplied.)

In *State Tax Commission v. Barnes*, 178 N.Y.S. 2d 932 (1958), the New York Court held,

'In my opinion the approval of the United States has never been necessary in order to allow the State of New York to impose taxes on Indians".

It went on to say,

"The fact that the Indians reside of the Reservation or elsewhere does not affect their liability to pay State income taxes, so long as they are residents of New York".

The Court also held that the tax was sustained even though the land on the Reservation was not subject to State or local real property taxes, and even if the State obtained a judgment for unpaid taxes of any kind, including income taxes, the State could not levy execution against the land on the Reservation. This opinion was affirmed in *Powless v. State Tax Commision of New York*, 253 N.Y.S.2d 438 (1964).

In *Leahy v. The State Treasurer of Oklahoma*, 49 P.2d 570 (1935), which was later affirmed by the United States Supreme Court, 297 U.S. 420, 80 L.Ed 771 1936), the Oklahoma Supreme Court held,

"It is plain that the income here in question was free from government restrictions, and was not subject to control by any Federal agency; therefore, a tax levied by the State could not be a direct burden upon a governmental instrumentality, and could not be termed an interference by the State with the operations of Federal government".

In *Ghabate v. Bureau of Revenue*, 451 P.2d 1002 (1969), the New Mexico appellate court found that imposition of the New Mexico State income tax did not interfere with Reservation self-government on the Zuni Reservation. This case is particularly significant, not only because of the almost identical factual situation as the case at bar, but the State of New Mexico has an Enabling Act identical to that of the State of Arizona. The New Mexico court discussed and met most of the contentions raised by counsel for the Plaintiff here, holding that New Mexico could impose the tax against Zuni Indians, notwithstanding the fact that the State had not assumed jurisdiction over Reservation Indians and in spite of the disclaimer set forth in its Enabling Act.

From the above cases we conclude that imposition of the Ari-

zona income tax on Plaintiff does not interfere with Tribal self-government of the Navajo Tribe.

The United States Supreme Court held in *Choteau v. Burnett*, 283 U.S. 967, 75 L.Ed. 1353 (1931), that a member of the Osage Tribe is liable for Federal income tax. Plaintiff is also subject to Federal income taxes. *Squire v. Capoeman*, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883 (1956); *Holt v. C.I.R.*, 364 F.2d 38 (1966).

By imposition of an income tax on Indians, Arizona does not pre-empt nor preclude the Navajo Tribe from imposition of its own income tax. Indeed, the Navajo, in payment of State, Federal and Tribal taxes would be no different from other taxpayers paying city, state and Federal taxes. We find no interference with Tribal self-government. Instead, we find that imposition of the tax is in the long run beneficial to the Navajo, and may well speed up the full integration into our political, social and economic culture.

Finally, we have endeavored in this decision to avoid the pitfall mentioned by Aristotle when he said,

> "They who take only a few points into account find it easy to pronounce sentence."

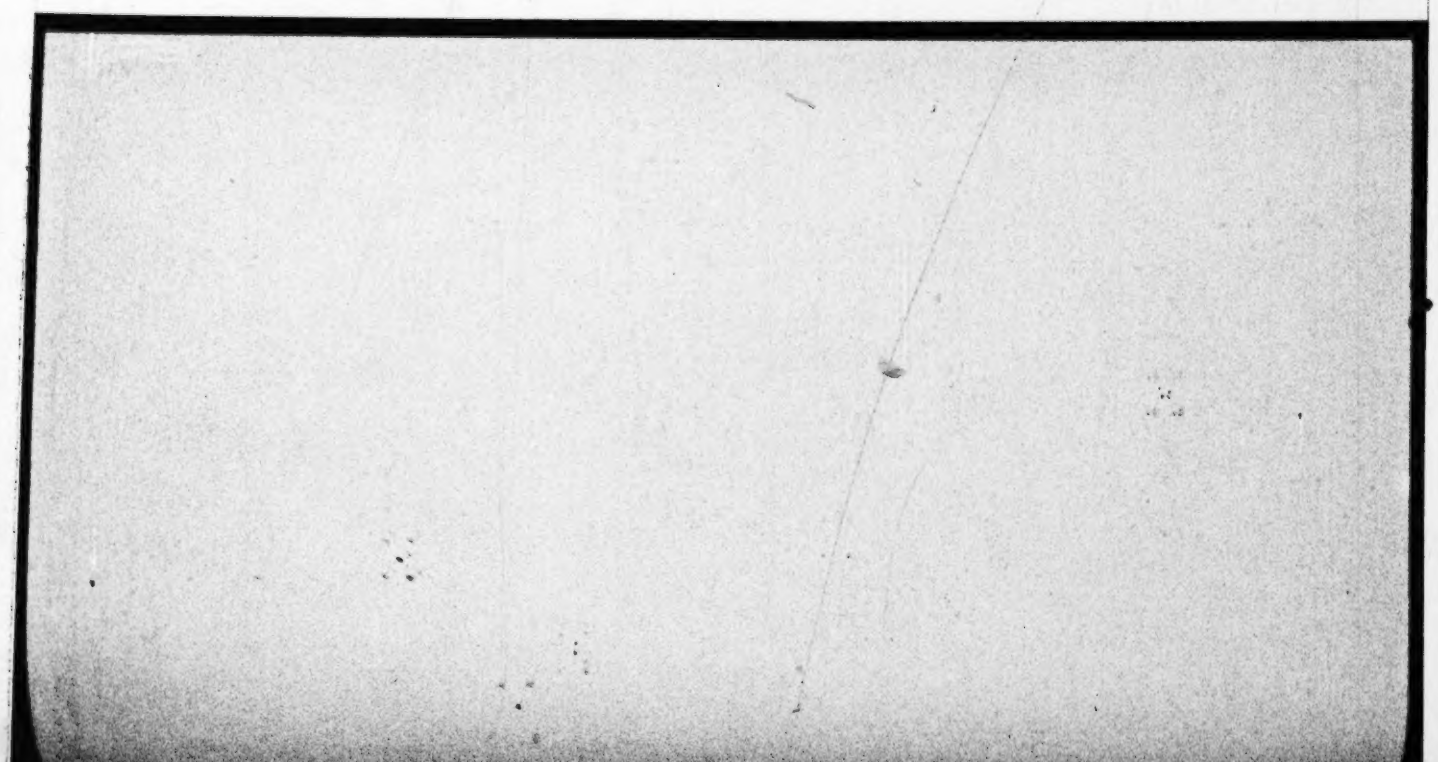
But it does appear, essentially, that this is a matter between the sovereign State of Arizona and one of its citizens. Justice Brandeis stated in *Leahy, supra,*

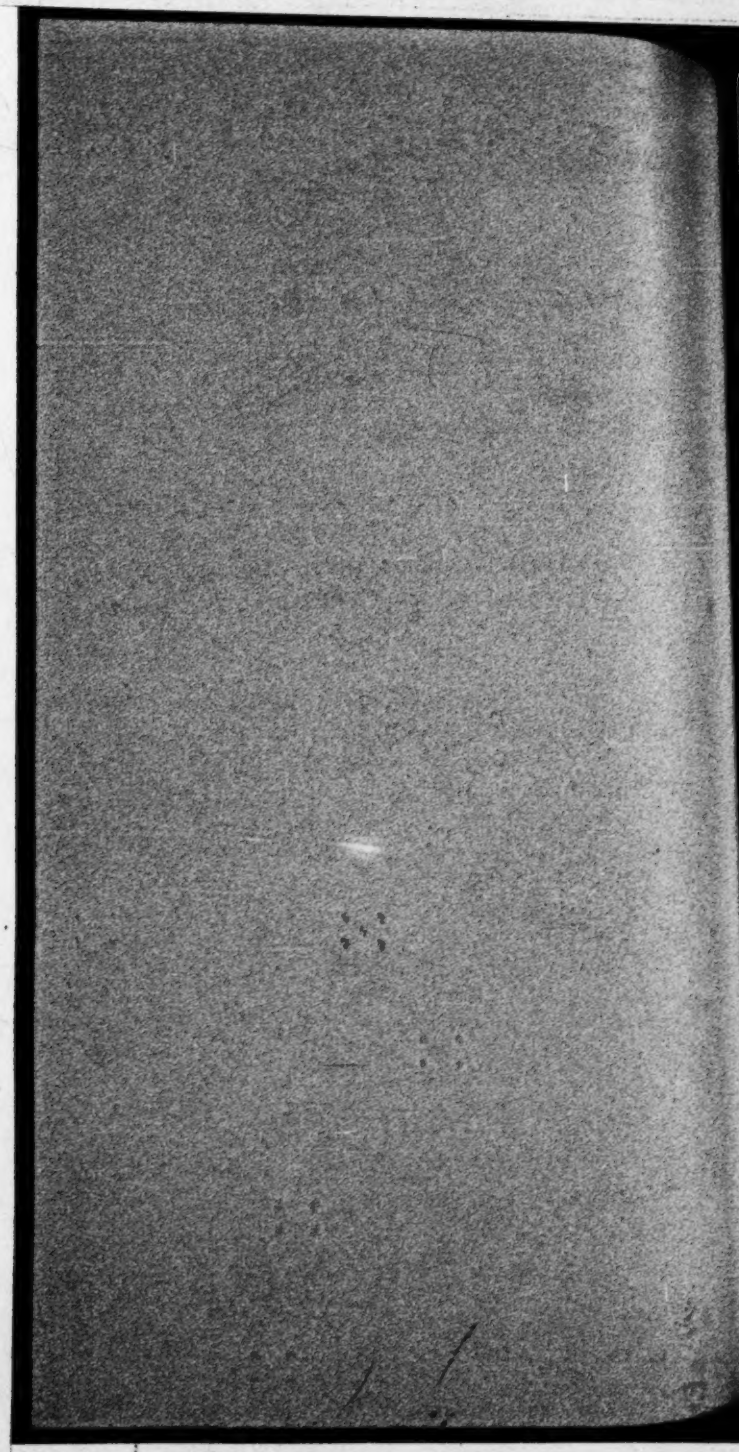
> "As Leahy was entitled to have the income paid to him and was free to use it as he saw fit, no reason appears why it should not be taxed also by the State."

The Motion to Dismiss, heretofore filed by the Defendant State Tax Commission of Arizona, be and is hereby granted.

DATED this 12th day of January, 1970.

/s/ D. L. GREER
D. L. Greer
Judge of the Superior Court





INDEX

	Page
Motion to Dismiss or Affirm	1
Statement of the Case	2
Question Presented	6
The Questions Raised Are Not Substantial	7
Tribal Sovereignty Not Violated By Arizona's Taxation Of Income Of Reservation Indians	7
Collection Of State Income Tax From Reservation Indians Does Not Require Congressional Authorization	18
Conclusion	21

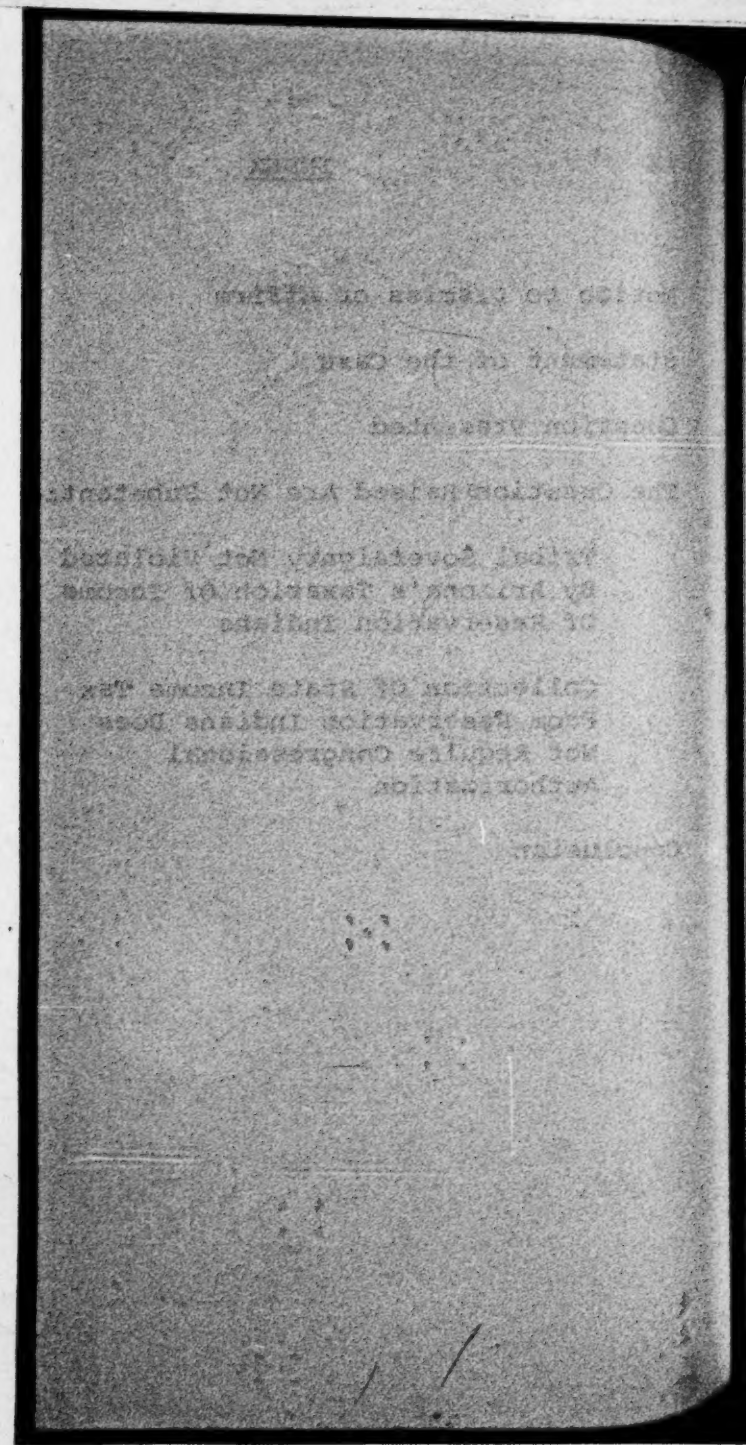
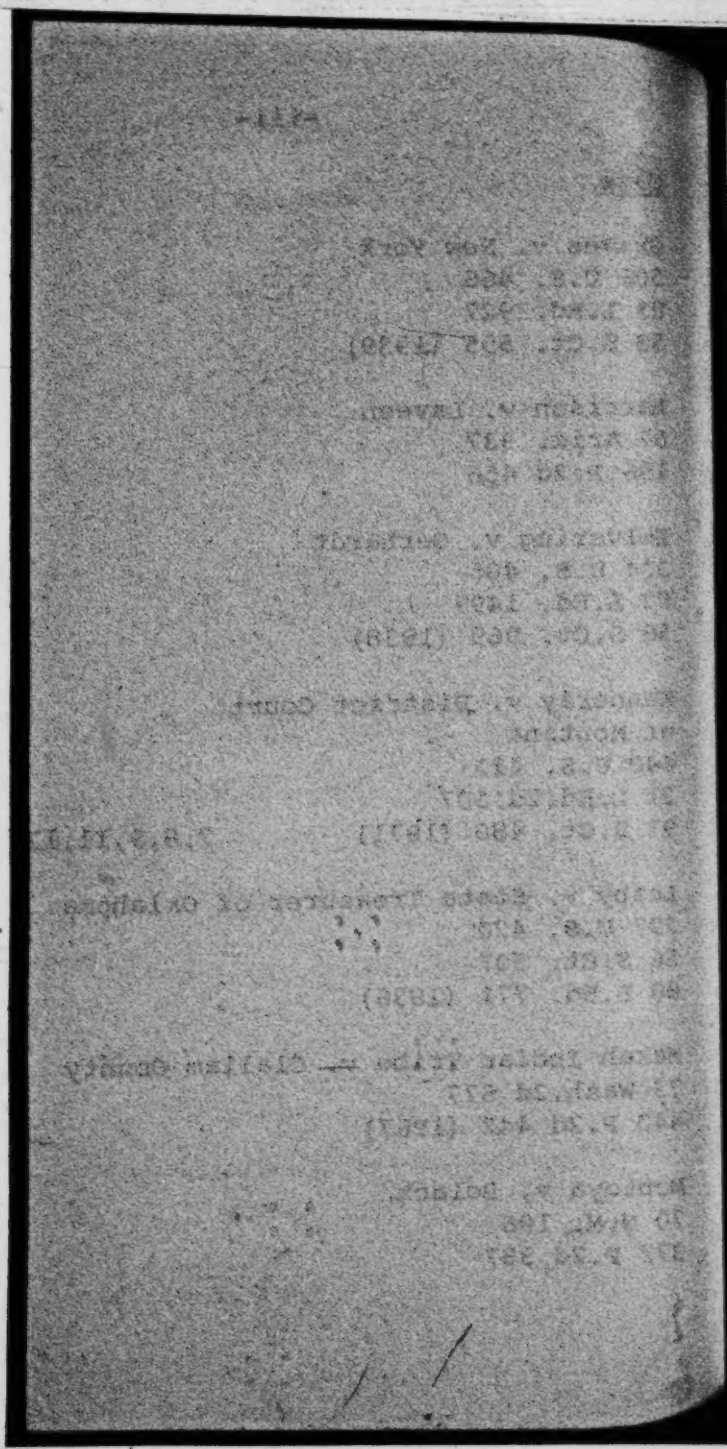


TABLE OF CASES AND AUTHORITIES

Case	Page
Acosta v. San Diego County 272 P.2d 92	21
Alabama v. King & Boozer 314 U.S. 1 62 S.Ct. 43 86 L.Ed. 3 (1941)	14
Begay v. Sawtelle 53 Ariz. 304 88 P.2d 999	10
Bradley v. Arizona Corporation Commission 60 Ariz. 508 141 P.2d 524	10
Choteau v. Burnet 283 U.S. 691 75 L.Ed. 1353 51 S.Ct. 598 (1931)	15
Denison v. State 34 Ariz. 144 268 P. 617	10
Ghahate v. Bureau of Revenue 80 N.M. 98 451 P.2d 1002	16

TABLE OF CASES AND AUTHORITIES

Case	Page
Graves v. New York 306 U.S. 466 83 L.Ed. 927 59 S.Ct. 595 (1939)	15
Harrison v. Laveen 67 Ariz. 337 196 P.2d 456	9,10
Helvering v. Gerhardt 304 U.S. 405 82 L.Ed. 1497 58 S.Ct. 969 (1938)	15
Kennerly v. District Court of Montana 400 U.S. 423 27 L.Ed.2d 507 91 S.Ct. 480 (1971)	7,8,9,11,12,13
Leahy v. State Treasurer of Oklahoma 297 U.S. 420 56 S.Ct. 507 80 L.Ed. 771 (1936)	16
Makah Indian Tribe v. Clallam County 73 Wash.2d 677 440 P.2d 442 (1967)	17
Montoya v. Bolack 70 N.M. 196 372 P.2d 387	21

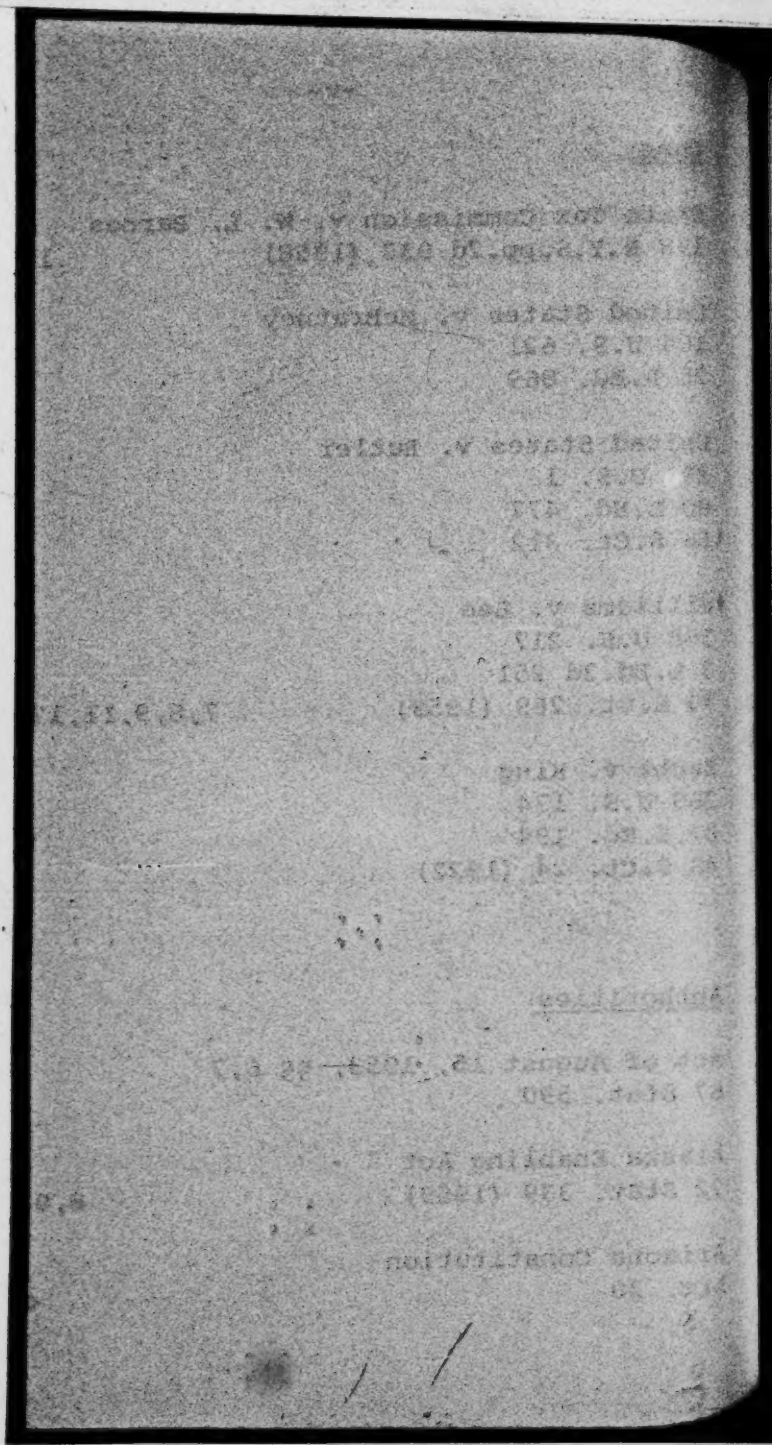


Case	Page
Oklahoma Tax Commission v. Texas Company 336 U.S. 342 93 L.Ed. 721 (1949)	13
Oklahoma Tax Commission v. United States 319 U.S. 598 87 L.Ed. 1612	12,21
Organized Village of Kake v. Egan 369 U.S. 60 7 L.Ed.2d 573 82 S.Ct. 562	9,20
Pourier v. Board of Commissioners 83 S.C. 235 157 N.W.2d 532 (1969)	17
Powless v. State Tax Commission 253 N.Y.Supp.2d 438 (1964)	16
Silas Mason Company v. Tax Commission of Washington 302 U.S. 186 82 L.Ed. 187 (1937)	19
Sohol v. Clark ___ Wash. ___ 479 P.2d 925 (1971)	17
State of Arizona v. Hobby 221 F.2d 498	10

Case	Page
State Tax Commission v. W. L. Barnes 178 N.Y.Supp.2d 932 (1958)	16,21
United States v. McBratney 104 U.S. 621 26 L.Ed. 869	9
United States v. Butler 297 U.S. 1 80 L.Ed. 477 56 S.Ct. 312	19
Williams v. Lee 358 U.S. 217 3 L.Ed.2d 251 79 S.Ct. 269 (1959)	7,8,9,11,12,13
Zucht v. King 260 U.S. 174 67 L.Ed. 194 43 S.Ct. 24 (1922)	22

Authorities

Act of August 15, 1953, §§ 6,7 67 Stat. 590	8
Alaska Enabling Act 72 Stat. 339 (1959)	8,9,20
Arizona Constitution Art. 20	4,5



Authorities	Page
Arizona Enabling Act 36 Stat. 557 (1910)	3,4,5,9
Arizona Revised Statutes § 43-186(d) § 43-188(f)	3 3
Civil Rights Act of 1968 25 U.S. Code 1321	8
Senate Report 699 July 29, 1953 1953 U.S. Code Congressional and Administrative Service 2412	8
Treaty of 1868 between the United States of America and the Navajo Tribe 15 Stat. 667	4,17
United States Constitution Art. 1, Sec. 8, Cl. 3 Amendment X	19 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-834

ROSALIND McCLANAHAN,
on behalf of herself and all others similarly situated,

Appellant,

vs.

ARIZONA STATE TAX COMMISSION,

Appellee.

On Appeal from the
Supreme Court of the State of Arizona

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss this appeal because the issue presented is whether the State of Arizona, which imposes an income tax upon the entire net income of every resident of the State, may impose such

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-5139

DECLARATION,

Petitioner,

v.

Respondent.

On Appeal from the
Supreme Court of the State of Arizona

MOTION TO DISMISS THE APPEAL

Appellee moves the Court to dismiss
this appeal because the issue presented
whether the State of Arizona, using law
an income tax upon the wealth not income
every resident of the state, may impose

tax on members of the Navajo Indian Tribe residing and earning income within the boundaries of the Navajo Indian Reservation in the State of Arizona. The questions involved in this issue have already been decided by this Court and this case does not, therefore, present a substantial federal question.

STATEMENT OF THE CASE

Rosalind McClanahan, appellant herein is a citizen of the United States and an enrolled member of the Navajo Tribe of Indians. During the 1967 calendar year, appellant resided within the exterior boundaries of the Navajo Indian Reservation, on that portion of the Reservation which is within the State of Arizona. Appellant's income during the 1967 calendar year was wholly derived from sources within the confines of

[illegible] economic welfare of the Navajo Indian by [illegible] spending and earning income within the [illegible] denial of the Navajo Indian beneficiaries [illegible] the State of Arizona. The questions [illegible] involved in this cause have already been [illegible] cided by this Court and this case does [illegible] therefore, present a substantial federal [illegible] question.

STATEMENT OF THE CASE

[illegible] Navajo Nation, appellant here [illegible] duly citizens of the United States and [illegible] enrolled members of the Navajo Tribe of [illegible] dians. During the 1947 calendar year, [illegible] lant resided within the exterior boundary [illegible] of the Navajo Indian Reservation, or the [illegible] sion of the Reservation which is within [illegible] the State of Arizona. Appellant's income [illegible] during the 1947 calendar year was wholly [illegible] rived from sources within the exterior [illegible]

the Navajo Indian Reservation. The total amount of tax withheld from appellant's income pursuant to Ariz. Rev. Stat. Ann. § 43-188(f) amounted to $16.20. On April 1, 1968, appellant filed an Arizona State Individual Income Tax Return.

Thereafter, appellant instituted a class action for refund in the Superior Court of Arizona in and for Apache County on June 17, 1969, pursuant to Ariz. Rev. Stat. Ann. § 43-186(d). Appellee moved to dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted. It was the appellee's position that the state income tax was applicable unless its application would interfere with reservation self-government or impair a right granted or reserved by federal law, and that the Arizona Enabling Act,

the Navajo Indian Reservation. The ta
account of tax withheld from appellant'
case pursuant to Ariz. Rev. Stat. Ann.
(1956) amounted to $16,20. On April 1
1959, appellant filed an Arizona state
individual income tax return.

Thereafter, appellant initiated a
state action for refund in the Superior
Court of Arizona in and for Apache Coun
on June 17, 1959, pursuant to Ariz. Rev
Stat. Ann. § 43-180(d). Appellee moved
dismiss on the ground that the complai
failed to state a claim upon which relie
could be granted. It was the appellee's
position that the state income tax was
valid unless its application would inter
fere with reservation self-government or
impair a right granted or reserved by fe
eral law, and that the Arizona Enabling

36 Stat. 557, 570 (1910), the Arizona Constitution, Article 20, and the Treaty of 1868 between the United States and the Navajo Tribe 15 Stat. 667, did not contain any provisions that would prohibit the imposition of the Arizona state income tax on the income of Indians residing on the Navajo Reservation within the boundaries of the State of Arizona.

The appellant contended that (1) absent an act of Congress expressly conferring such power, the State of Arizona has no power to tax the income of the appellant; (2) Arizona has no power to tax the income of the appellant because the exercise of such a power would interfere with powers essential to the self-government of the Navajo Tribe; (3) the Arizona Enabling Act and Article 20 of the Arizona Constitution preclude the State of Arizona from applying its income tax to the

income of reservation Indians.

The Superior Court dismissed appellant's complaint on January 12, 1970, holding that the State of Arizona did not require express congressional authority to tax the appellant, and that the income tax imposed and collected by appellee did not interfere with tribal self-government. The appellant then noticed an appeal to the Court of Appeals of the State of Arizona. The Court of Appeals affirmed the Superior Court's dismissal of the complaint on April 28, 1971. The Court of Appeals based its decision on its conclusions that imposition of the income tax did not infringe upon the right of self-government of the Navajo Tribe and that the Arizona Enabling Act, Section 20, 36 Stat. 369, and the Arizona Constitution, Article 20, did not bar im-

[illegible] of reservation Indians."

The Superior Court dismissed appe[llant's] complaint on January 12, 1970, [holding] that the State of Arizona did not [possess] constructional authority to tax [appellant], and that the income tax imp[osed] and collected by appellee did not unde[rmine] certain tribal self-government. The stipu[lation] then recited an appeal to the Court of [Appeals] of the State of Arizona. The Co[urt] of Appeals affirmed the Superior Court's [dismissal] of the complaint on April 28, [1971]. The Court of Appeals based its d[ecision] on its conclusions that imposition [of] the income tax did not interfere upon [the] right of self-government of the Navajo [Tribe] and that the existing Enabling Act, [Section] 20, 36 Stat. 568, and the Arizo[na] Constitution, Article XX, did not [illegible]

position of the Arizona income tax. On May 11, 1971, appellant moved for a rehearing, which was denied on June 8, 1971. Appellant then filed a petition for review by the Supreme Court of Arizona on June 22, 1971, and said petition was denied on September 21, 1971. Appellant filed the Notice of Appeal to the Supreme Court of the United States in the Superior Court, the court possessed of the record on October 4, 1971

QUESTION PRESENTED

The basic question presented by this appeal is: May a state having an income tax statute imposing a net income tax upon the entire net income of every resident of the state impose such a tax upon income earned on an Indian reservation within the

[illegible] Arizona Income-Tax [illegible]
[illegible] 11, 1971, appellant moved for a re[illegible]
[illegible]ing, which was denied on June 8, 1971.
[illegible]pellant then filed a petition for revi[illegible]
[illegible] the Supreme Court of Arizona on June 2[illegible]
[illegible]1971, and said petition was denied on
[illegible]September 21, 1971. Appellant filed t[illegible]
[illegible]diction of Appeal to the Supreme Court
[illegible]ited States in the Superior Court, p[illegible]
[illegible]court pursuant of the record on Octobe[illegible]
[illegible]1971.

QUESTION PRESENTED

The basic question presented by th[illegible]
[illegible]ppeal is: May a state having an income
[illegible]tax statute imposing a net income tax u[illegible]
[illegible]the entire net income of every resident
[illegible]the state impose such a tax upon income
[illegible]rned on an Indian reservation within

state by members of an Indian tribe residing in the state on that Indian reservation?

THE QUESTIONS RAISED ARE NOT SUBSTANTIAL

TRIBAL SOVEREIGNTY NOT VIOLATED BY ARIZONA'S TAXATION OF INCOME OF RESERVATION INDIANS

The general rule for determining the validity of state action in respect to Indian reservations is:

> Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. Williams v. Lee, 358 U.S. 217, 3 L.Ed.2d 251, 79 S.Ct. 269; Kennerly v. District Court of Montana, 440 U.S. 423, 27 L.Ed.2d 507, 91 S.Ct. 480.

State action in respect to Indian reservations was successfully challenged in the Williams and Kennerly cases, but those cases are distinguishable from this case because

both of those cases involved governing acts of Congress. The Act of August 15, 1953, Sections 6 and 7, 67 Stat. 590, and the Civil Rights Act of 1968, 25 U.S. Code 1321-1326, both give the consent of the United States to any state not having jurisdiction over civil causes of action to assume such jurisdiction. From the language utilized in these statutes as well as Senate Report 699, dated July 29, 1953, 1953 U.S. Code Congressional and Administrative Service 2412, it is apparent that the purpose of this legislation was to give the consent of the United States to the removal of any state enabling act impediments to assumption of state jurisdiction on Indian reservations.

In the Williams and Kennerly cases, supra, the jurisdiction referred to is civil causes of action. The State of Alaska

[illegible] of those cases involved governing
[illegible] Congress, the Act of August 1st, 19
[illegible] sections 6 and 7, 67 Stat. 590, and the
[illegible] Civil Rights Act of 1964, 78 U.S. Code
[illegible] 2000, does give the consent of the Uni
[illegible] waive to any state not having jurisdic
[illegible] over civil causes of action to assume
[illegible] jurisdiction. From the language used
[illegible] in these statutes as well as Senate Rep
[illegible] dated July 20, 1953, U.S. Code
[illegible] Congressional and Administrative Servic
[illegible], it is apparent that the purpose o
[illegible] this legislation was to give the consen
[illegible] the United States to the removal of any
[illegible] state conferring act impediments to assump
[illegible] of state jurisdiction on Indian reservat

In the Williams and Kennerly cases,
[illegible] cause, the jurisdiction referred to in t
[illegible] clauses of section. The State of Alaska

Enabling Act contained a disclaimer provision and an absolute jurisdiction provision like that of Section 20 of the Arizona Enabling Act, 36 U.S. Stat. 557. In construing those provisions in Organized Village of Kake v. Egan, 369 U.S. 60, 7 L.Ed.2d 573, 82 S.Ct. 562, the Court pointed out that the disclaimer of right and title by the state was a disclaimer of proprietary rather than governmental interest and that the purpose of the absolute jurisdiction and control provision was to avoid the possibility that under United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869, federal criminal jurisdiction over Indian reservations might be extinguished by statehood. Thus, the term "jurisdiction" has been used in both the Court decisions such as the Williams and Conner ly cases, supra, and by Congress to

[illegible] Act contained a disclaimer pr
[illegible]ion and an absolute jurisdiction prov
[illegible]like that of Section 25 of the Arizona
[illegible]ing Act, 36 U.S. Stat. 557. In con
[illegible]ing those provisions in Oregon ex rel
[illegible] of Hake v. Egan, 363 U.S. 60, 7 L.Ed.2d
[illegible]310, 82 S.Ct. 562, the Court pointed ou
[illegible]ther the disclaimer of right and title
[illegible]ct state was a disclaimer of proprietar
[illegible]rather than governmental interest and t
[illegible]the purpose of the absolute jurisdictio
[illegible]control provision was to avoid the poss
[illegible]ity that under United States v. Depart
[illegible]ina U.S. 821, 76 S.Ct. 862, federal cri
[illegible]jurisdiction over Indian reservations m
[illegible]be extinguished by statehood. Thus, the
[illegible]term "jurisdiction" has been used in bot
[illegible]the Court decisions such as the Williams
[illegible]boundary cases, supra, and by Congress t

mean jurisdiction in the sense in which it is employed to describe the scope of power of courts to act rather in the broader sense of the general scope of governmental powers. Under the construction that has been placed on State Enabling Acts, neither those acts nor the legislation to remove the impediments created by the State Enabling Acts bar application of a state income tax to income of Indian residents of an Indian reservation. Therefore, no governing act of Congress is involved in this case.

For many years state governments have proceeded on the basis of the assumption that the states do have a certain amount of jurisdiction in respect to Indian reservations. Reliance on this assumption is indicated by the following decisions: Indians have the right to vote, Harrison v. Laveen,

67 Ariz. 337, 196 P.2d 456; the right to serve on a jury, Denison v. State, 34 Ariz. 144, 268 P. 617; the right to a hunting and fishing license so that he may hunt and fish off the Indian reservation, Begay v. Sawtelle, 53 Ariz. 304, 88 P.2d 999; and the right to the issuance of a contract carrier permit by the Corporation Commission, Bradley v. Arizona Corporation Commission, 60 Ariz. 508, 141 P.2d 524. In State of Arizona v. Hobby, 221 F.2d 498, the Court upheld the refusal of a federal administrator to approve Arizona's welfare program which excluded the reservation Indians. Courts have repeatedly held that Indians are citizens of the state; that they are entitled to the services and benefits available to others and the denial of these is a denial of equal protection. By writs of mandamus

and other appropriate measures, the courts have enforced these rights of Indian citizens.

In its opinion in this case, the Court of Appeals pointed out that counsel for the appellant had conceded in oral argument that tax monies of the State of Arizona were being expended for education and welfare within the confines of the Navajo Reservation and the Navajo Indians were the beneficiaries of these expenditures.

The Court decisions cited in the preceding paragraph and the action of the State of Arizona in expending its funds on the Indian reservation indicate that the State does have a certain amount of general governmental jurisdiction on the reservation. The test that the Court utilized in Williams v. Lee, and reaffirmed in Kennerly, supra, indicates that the states have a

certain amount of jurisdiction on Indian reservations. The appellant urges that in the absence of congressional authorization, the states cannot act. That position is clearly in conflict with the test evolved in Williams v. Lee and Kennerly, supra. If congressional authorization was the test, then it would have been unnecessary for the court to formulate the infringement of self-government portion of the rule in the Williams case.

Equality of privilege and equality of obligation should be inseparable associates. Oklahoma Tax Commission v. United States, 319 U.S. 598, 87 L.Ed. 1612, 1620. Since the members of the Navajo Tribe receive many benefits of state government, it is certainly just that they bear a few burdens of state government that do not infringe upon the right of self-government of the Navajo Tribe.

Cases involving the immunity of government instrumentalities from taxation are based on the same rationale as the infringement of the right of self-government test of Williams v. Lee, supra. In both of these cases the concern is whether there has been interference with the right of self-government. This problem was considered in Oklahoma Tax Commission v. Texas Company, 336 U.S. 342, 93 L.Ed. 721 (1949), and the Court concluded:

> So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. * * * the power to tax should not be crippled by extending the constitutional exemption from taxation to those subjects which fall within the general application of nondiscriminatory laws, and where no direct burden is laid upon the governmental in-

cases involving the immunity of o
instrumentalities from taxation m
based on the same factors as the im
ent of the right of self-government te
Gillman v. Sea, supra. In both of
cases the question is whether there has
interference with the right of self-gov
ment. This problem was considered in
Indiana Tax Commission v. Texas Company
(U.S. 1942, 87 L.Ed. 751 (1943), and
court concluded:

"In fact as subtle modifications may
create tax burdens upon the instrumentality
here into the field of the activities
of the government, there is but a
short boundary of the opportunities
tion which the same territory of
the sovereign taxing sovereign-
ties. * * * the power to tax
should not be crippled by extend-
ing the constitutional exemption
from taxation to every subject
matter that will within the general
application of nondiscrimination
laws, and where no direct burden
is laid upon the governmental in-

> strumentality and there is only remote, if any, influence upon the exercise of the functions of the government. * * * immunity from nondiscriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effect.

A situation where the direct effect of a tax is on the government is suggested by Alabama v. King & Boozer, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941). If the legal incidence of the tax was on the Navajo Tribe such a tax would infringe on the Navajo right of self-government. Of course, it has not been shown that the legal incidence of this tax is on the Navajo Tribe.

A tax upon a Navajo Indian residing on the Navajo Reservation in respect to income earned on the reservation does not have any

direct effect on the Navajo right of self-government just as a United States tax on Arizona citizens does not impair the sovereignty of the State of Arizona, nor does an Arizona state income tax impair the sovereignty of the United States. In Helvering v. Gerhardt, 304 U.S. 405, 82 L.Ed. 1497, 58 S.Ct. 969 (1938), the power of the federal government to impose an income tax on employees of the Port Authority of New York was upheld and in Graves v. New York, 306 U.S. 466, 83 L.Ed. 927, 59 S.Ct. 595 (1939), the power of a state to levy an income tax on the salary of federal employees was upheld.

Indians are not exempt from taxation because of their status as Indians. Choteau v. Burnet, 283 U.S. 691, 75 L.Ed. 1353, 51 S.Ct. 598. The imposition of income taxes

upon Indians by states has been upheld in Leahy v. State Treasurer of Oklahoma, 297 U.S. 420, 56 S.Ct. 507, 80 L.Ed. 771; State Tax Commission v. W. L. Barnes, 178 N.Y. Supp.2d 932 (1958); Powless v. State Tax Commission, 253 N.Y.Supp.2d 438 (1964); and Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002. These decisions are a further indication that the application of state income taxes to Indians residing on Indian reservations does not infringe upon the Indian right of self-government. In the Ghahate case, the parties even stipulated that the imposition of the income tax did not infringe upon the Indian right of self-government. Looking at the historical experience of our federal system of government where income taxes have been imposed by both state and federal governments at the

same time, on the same citizens, there is nothing in this picture to indicate that the Arizona income tax will in substance, rather than in theory, infringe on the Navajo right of self-government which is protected by the Treaty of 1868, 15 Stat. 667.

Various state court cases cited by the appellant in support of her position such as Sohol v. Clark, ___ Wash. ___, 479 P.2d 925 (1971); Pourier v. Board of Commissioners, 83 S.D. 235, 157 N.W.2d 532 (1969); Makah Indian Tribe v. Clallam County, 73 Wash.2d 677, 440 P.2d 442 (1967), are not in point. These cases all involved the assessment of personal property taxes on personal property that was furnished to Indians by the United States for governmental purposes or property which was used in connection with trust property or property which was acquired with

the proceeds of the sale of trust lands. In each of these cases the effect of imposing the property tax was to tax an instrumentality of the United States Government. The appellant has not claimed that the income which the State seeks to tax in this case is exempt from tax because it is income from the sale of trust property or income from trust property.

COLLECTION OF STATE INCOME TAX FROM RESERVATION INDIANS DOES NOT REQUIRE CONGRESSIONAL AUTHORIZATION

Amendment X of the United States Constitution provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The federal union has only the powers expressly conferred on it and those reasonably

implied from powers granted, while each state has all governmental powers except such as the people, by the constitution, have conferred on the United States denied to the state, or reserved to themselves. United States v. Butler, 297 U.S. 1, 80 L.Ed. 477, 56 S.Ct. 312.

The only provision of the Constitution expressly conferring power upon Congress in regard to Indian tribes is Article 1, Sec. 8, Clause 3, which gives Congress the power to regulate commerce with Indian tribes. There is no provision in the United States Constitution which prohibits states from exercising jurisdiction in levying taxes in respect to Indian reservations. In Silas Mason Company v. Tax Commission of Washington, 302 U.S. 186, 82 L.Ed. 187, 203 (1937), the Court disposed of the argument of exclusive

jurisdiction barring imposition of a state tax on an Indian reservation with its holding that although title to the lands had always been in the United States, exclusive legislative authority could be obtained by the United States only through cession by the state. Accordingly, the state had jurisdiction to impose its tax.

In view of the decision in Organized Village of Kake v. Egan, supra, construing the disclaimer and absolute jurisdiction and control provisions of the Alaska Enabling Act, it is clear that Arizona did not surrender jurisdiction for general governmental purposes as contended by the appellant here and that the State, therefore, has the authority to impose this income tax upon all its citizens. The courts have rejected the argument that the federal government

has exclusive authority in respect to Indian reservations. Acosta v. San Diego County, 272 P.2d 92; Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387. It has been held that United States approval is not required for imposition of a state income tax on Indians. State Tax Commission v. W. L. Barnes, supra.

As this Court noted in Oklahoma Tax Commission v. United States, supra, Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes. When Congress wants to require nontaxability it can, as it has so often done, say so explicitly.

CONCLUSION

From the numerous previous decisions of this and other courts, it is clear that

the test of validity of state action on Indian reservations is:

> Essentially, absent governing acts of Congress, the question has always been whether state action infringed upon the right of reservation Indians to make their own laws and be ruled by them.

On the basis of the many prior decisions cited herein, it is equally clear that no governing act of Congress is involved in this case and this state action does not infringe upon the Indian tribe's right of self-government.

The Supreme Court will decline jurisdiction when the constitutional question is not substantial. Zucht v. King, 260 U.S. 174, 67 L.Ed. 194, 43 S.Ct. 24 (1922). From the previous decisions cited in this motion, it is apparent that no substantial federal question is involved in this case. Accordingly, the

the test of validity of state action on
Indian reservations is,

> Essentially, absent governing acts
> of Congress, the question has al-
> ways been whether state action
> infringed upon the right of res-
> ervation Indians to make their
> own laws and be ruled by them.

In the basis of the many prior decisions
A[illegible] herein, it is equally clear that no
governmental act of Congress is involved in
this case and thus state action does not
infringe upon the Indian tribe's right of
self-government.

The Supreme Court will decline jurisdiction when the constitutional question is not substantial. Wells v. Nine, 289 U.S. 171, 57 L.Ed. 134, 43 S.Ct. 66 (1922). In the previous decisions cited in this writ it is apparent that no substantial federal question is involved in this case. Accordingly

Court should dismiss the appeal or affirm the judgment.

Respectfully submitted,

GARY K. NELSON
The Attorney General
of Arizona

James D. Winter

JAMES D. WINTER
Assistant Attorney General

January, 1972.

INDEX

	Page
INTRODUCTORY	1
INTEREST OF THE AMICUS CURIAE	1
REASONS WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL FEDERAL QUESTIONS	3
CONCLUSION	10

TABLE OF AUTHORITIES

Cases Page

Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938) 10

Commission of Taxation v. Brun, 286 Minn. 43, 174 N.W.2d 120 (1970) 2,4

Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002 (1969) 2,4

Humble Pipeline Co. v. Waggonner, 376 U.S. 369 (1964) 10

Kahn v. Arizona State Tax Comm'n, 490 P.2d 846 (Ariz. Ct. App. 1971) 2,4

Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) 9

Kennerly v. District Court of Ninth Jud. Dist. of Montana, 400 U.S. 423, 91 S.Ct. 480 (1971) 4, 6-7

McClanahan v. State Tax Comm'n, 14 Ariz.App. 452, 484 P.2d 221 (1971) 2, 4, 8

Mississippi River Fuel Corp. v. Cocreham, *cert. denied*, 382 F.2d 929 (5th Cir. 1967), *cert. denied*, 390 U.S. 1014 (1968) 10

Organized Village of Kake v. Egan, 369 U.S. 69, 71 (1962) 9

United States v. Kagama, 118 U.S. 375 (1886) 10

Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 686-87 (1965) 8, 10

Williams v. Lee, 358 U.S. 217 (1959) 2, 4, 8

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 10

Federal Statutes

Arizona Enabling Act, § 20, 36 Stat. 569 (1910) 8

Buck Act, 61 Stat. 641 (1947) 9

4 U.S.C. § 101-110 (Supp. 1971) 9

4 U.S.C. § 106(a) (Supp. 1971) 9

TABLE OF AUTHORITIES (Continued)

	Page
4 U.S.C. § 109 (1971)	9
25 U.S.C. § 110(e) (Supp. 1971)	9
25 U.S.C. § 1321-1326 (Supp. 1971)	3
25 U.S.C. § 1322(a), 1326 (Supp. 1971)	5-6
25 U.S.C. § 1324 (Supp. 1971)	6
Act of August 15, 1953, § 7, 67 Stat. 590	4, 7-8
Civil Rights Act of 1968, 82 Stat. 78 (1968)	3, 7-8
Public Law 83-280	7-8
Arizona Constitutional Provision	
Ariz. Const. Art. 20, Para. 4	6

OTHER AUTHORITIES

Comment, *Indian Taxation: Underlying Policies and Present Problems,* 59 Calif.L.Rev. 1261, 1285-1286 (1971)	2
Comment, *State Taxation of Indian Income,* 1971 Law & Soc. Order 355	2
Comment, *The Power of a State to Impose an Income Tax on Reservation Indians,* 6 Willamette L.J. 515 (1970)	2
113 Cong. Rec. 35471-35477 (1967)	3
114 Cong. Rec. 394 (1968)	7
114 Cong. Rec. 5836-5838 (1968)	3
Jones, Paul, Former Chairman, Navajo Tribal Council, *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Committee on the Judiciary,* 88th Cong., 1st Sess., pt. 4, at 851-71 (1964)	3
S. 1843, 90th Cong., 1st Sess. (1967)	3, 7-8
S. Rep. No. 721, 90th Cong., 1st Sess. 32 (1967)	7
S. Rep. No. 841, 90th Cong., 1st Sess. 5 (1967)	3, 7-8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-834

ROSALIND McCLANAHAN,
on behalf of herself and all others
similarly situated,
Appellant,

vs.

ARIZONA STATE TAX
COMMISSION,
Appellee.

On Appeal
From The
Supreme Court of
Arizona

BRIEF OF THE NAVAJO TRIBE OF INDIANS, AS AMICUS CURIAE, IN SUPPORT OF JURISDICTIONAL STATEMENT

Counsel for the parties have consented in writing to the filing of a brief in this case on behalf of the Navajo Tribe of Indians, as *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The Navajo Tribe of Indians, the Nation's largest, occupies and controls a reservation including portions of three states. It is the Tribe of which Appellant here is an enrolled member; it was from within the Navajo Reservation that Appellant earned the income which the State of Arizona seeks to tax. It is on the

Navajo Reservation that Arizona seeks to impose its income tax law.

Because of the Navajo Tribe's concern for the economic welfare of its people, the Navajo Tribe believes that the application of Arizona's income tax laws to its people and its Reservation will have an untoward economic impact not considered by the Arizona taxing authorities or the Arizona courts. At the individual level, as this Court noted in *Williams v. Lee*, 358 U.S. 217, 222 n. 9 (1959), illiteracy and poverty characterize the plight of many Navajos. Those conditions prompted a President of the United States and later the United States Congress to abandon a program to subject Navajos to state jurisdiction. *Id.*

Although the Navajo Tribe has not subjected its many illiterate poor to a tribal income tax, the courts of two states, Arizona and New Mexico, portions of which are included within the Navajo Reservation, have sustained state assertions of income taxing power over those individual Navajos. See *McClanahan v. State Tax Comm'n*, 14 Ariz.App. 452, 484 P.2d 221 (1971); *Kahn v. Arizona State Tax Comm'n*, 490 P.2d 846 (Ariz. Ct. App. 1971); *Ghahate v. Bureau of Revenue*, 80 N.M. 98, 451 P.2d 1002 (1969). The rulings of those courts conflict with the ruling of the Minnesota court in *Commission of Taxation v. Brun*, 286 Minn. 43, 174 N.W.2d 120 (1970). Without an authoritative resolution of the matter by this Court, the result for the Navajo Tribe and its people, as for other Indian Tribes and their members, is confusion.[1]

The focus in the Arizona Court of Appeals' decision on the rights of the Navajo Tribe to be self-governing rather than on any infringement on Appellant's rights as an individual Navajo

---

[1]The national significance of the problem has prompted several critical analyses of the existing decisions. *See* Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 Calif.L.Rev. 1261, 1285-1286 (1971); Comment, *State Taxation of Indian Income*, 1971 Law & Soc. Order 355; Comment, *The Power of a State to Impose an Income Tax on Reservation Indians*, 6 Willamette L.J. 515 (1970).

requires a presentation of the position of the Navajo Tribe. Although Appellant, both before this Court and the state courts, has attempted vicariously to present the position of the Navajo Tribe, *amicus curiae* believes that the parties have insufficiently stressed those policies, supported by the Navajo Tribe, which Congress embodied in Title IV of the 1968 Civil Rights Act, 82 Stat. 78 (1968), 25 U.S.C. §§ 1321-1326 (Supp. 1971). Preliminarily, the Navajo Tribe emphasizes its long-time policy of encouraging negotiation with state officials on matters of state and Tribal jurisdiction[2] and the simultaneous opposition by the Navajo Tribe to unilateral state assertion of jurisdiction over Indian reservations, without the consent of the Indians affected.[3] Those policies appear especially relevant to the dispostion of this appeal because Congress incorporated them into federal law and because following the congressionally prescribed procedure assures that the needs and special circumstances of the Navajo people will be considered by State officials, with the result that the application of State law to Reservation Indians will accord with an elementary principle of our Nation's government, obtaining the consent of the governed.

REASONS WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL FEDERAL QUESTIONS.

The Arizona, Minnesota and New Mexico courts appear to have recognized the same test: whether the state income tax laws

[2]See, *e.g.*, Statement of Paul Jones, Former Chairman, Navajo Tribal Council, reported in *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Committee on the Judiciary*, 88th Cong., 1st Sess., pt. 4, at 851-71 (1964).

[3]That opposition, shared by leaders of other Indian Tribes, bulked large in persuading Congress to enact Title IV of the Civil Rights Act of 1968, 82 Stat. 78 (1968), 25 U.S.C. §§ 1321-1326 (Supp. 1971). See S.Rep. No. 841, 90th Cong., 1st Sess. 11-12 (1967), accompanying S. 1843, 90th Cong., 1st Sess. (1967) [hereinafter "Senate Bill 1843"], a bill which passed the Senate, 113 Cong. Rec. 35471-35477 (1967) and was then adopted as an amendment to the Dirksen amendment to the 1968 Civil Rights Act. See 114 Cong. Rec. 5836-5838 (1968). Title III of Senate Bill 1843 became Title IV of the 1968 Civil Rights Act.

infringed on the right of reservation Indians to make their own laws and be ruled by them. *McClanahan v. State Tax Comm'n*, 14 Ariz. App. 452, 456-57, 484 P.2d 221, 224-26 (1971); *Kahn v. Arizona State Tax Comm'n*, 490 P.2d 846, 849 (Ariz. Ct. App. 1971; *Commission of Taxation v. Brun*, 286 Minn. 43, 174 N.W.2d 120 (1970); *Ghahate v. Bureau of Revenue*, 80 N.M. 98, 451 P.2d 1002, 1004 (1969). While the Arizona and New Mexico courts sustained the state taxing power, the Minnesota court rejected it.

The tests formulated by the state courts purportedly derive from this Court's statement in *Williams v. Lee*, 358 U.S. 217, 220 (1959):

> "Essentially, *absent governing Acts of Congress*, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." (Emphasis added)

Significantly, in this case, the Arizona Court of Appeals' quotation from *Williams v. Lee, supra*, omitted the phrase, "absent governing Acts of Congress . . . ." *McClanahan v. State Tax Comm'n*, 14 Ariz. App. 452, 484 P.2d 221, 223 (1971).

This Court only last term reemphasized the importance of first determining the applicability of acts of Congress. *Kennerly v. District Court of Ninth Jud. Dist. of Montana*, 400 U.S. 423, 91 S.Ct. 480 (1971). Although that case, like *Williams v. Lee, supra*, involved the jurisdiction of a state court over a reservation Indian in an action by a non-Indian, this Court's decision did not apply the infringement of the right of tribal self-government test. Indeed, the Tribal Council resolution there permitting state courts to have concurrent jurisdiction over actions involving Tribal members suggested no infringement on Tribal self-government. Instead, this Court's decision cited a "governing act of Congress," § 7 of the Act of August 15, 1953, 67 Stat. 590, held that the applicable Congressional act rendered Tribal action entirely immaterial and found that because the state had not followed the

procedure prescribed by Congress, the state court had no jurisdiction.

In conjunction, the cited decisions of this Court teach that if an act of Congress applies to the assertion of state power over reservation Indians, the question is whether the state action conforms with the act of Congress, without regard to whether state action infringes on tribal self-government.

Such a governing act of Congress controls the disposition of this case. The statutes involved are sections 402(a) and 406 of Title IV of the Civil Rights Act of 1968, 82 Stat. 79, 80, 25 U.S.C. §§ 1322(a), 1326 (Supp. 1971), which provide as follows:

"(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, *and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.*" (Emphasis added)

"State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country *only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction* by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults." (Emphasis added)

That portion of § 402(a) italicized above amounts to con-

gressional authorization for the assertion of state legislative power over reservation Indians. However, as the portion of § 406 italicized above indicates, there can be no such assertion of state legislative power until a majority of the enrolled Indians accept that jurisdiction in a special election. Additionally, under § 404 of the Act, 82 Stat. 79 (1968), 25 U.S.C. § 1324 (Supp. 1971), Congress deferred the assumption of jurisdiction by a state under the Act "until the people thereof have appropriately amended their State constitution or statutes . . . ." The assertion here by Arizona of its income taxing power on the Navajo Reservation has not been preceded by either a special election of the Navajo people to accept that jurisdiction or an amendment by the people of Arizona of Ariz. Const. Art. 20, para. 4.[4]

Without the acceptance by the Navajo people of state jurisdiction at a special election and without the amendment by Arizona of its Constitution, the State's assertion of income taxing power on the Navajo Reservation must fail because there has been no compliance with that procedure which Congress made exclusive. Both this Court's decision in *Kennerly v. District Court of Ninth Jud. Dist. of Montana*, 400 U.S. 423, 91 S.Ct. 480 (1971), and the legislative history of Title IV of the 1968 Civil Rights Act demonstrate the exclusivity of that procedure. In *Kennerly*, this Court described Title IV of the 1968 Civil Rights Act as having "substituted a new regulatory scheme for the extension of state civil and criminal jurisdiction to litigation involving

---

[4] Ariz. Const. Art. 20, para. 4, *in pari materia* with the Arizona Enabling Act, § 20, 36 Stat. 569 (1910), discussed below, provides:

"Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within such boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

Indians arising in Indian country."[5] 91 S.Ct. at 482-483. In *Kennerly*, this Court also found that the Tribal resolution had not vested the state courts with jurisdiction despite the terms of the Tribal resolution because Congress had required a majority vote of the enrolled Indians as a "prerequisite to the assumption of state jurisdiction under the provisions of Title IV of the Act . . . ." 91 S.Ct. at 483. The exclusivity of the congressional procedure was emphasized by the dissenting opinion in *Kennerly* which attributed to the Court a holding that Congress had specified "the *exclusive* procedure by which reservation Indians may confer on a state court jurisdiction over them." (Emphasis added). 91 S.Ct. at 484.

During the discussion of Title IV of the 1968 Civil Rights Act, the sponsor of the Act, Senator Ervin of North Carolina stated on the Senate floor:

> "This title repeals section 7 of Public Law 280, 83d Congress (67 Stat. 588) and authorizes States to assert civil and criminal jurisdiction in Indian country *only after* acquiring the consent of the Tribes in the States by referendum of all reservated Indians." (Emphasis added) 114 Cong. Rec. 394 (1968).

Senator Ervin expressed similar views in the Committee Report on the 1968 Civil Rights Act. S.Rep.No. 721, 90th Cong., 1st Sess. 32 (1967). Senator Ervin's views resulted from a series of hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary in the consideration of Senate Bill 1843. S.Rep.No. 841, 90th Cong., 1st Sess. 5 (1967). As that Senate Committee stated, Tribal leaders had criticized Public Law 83-280, § 7 of the Act of August 15, 1953, 67 Stat. 590, because that statute authorized "unilateral application of state law" to Indian tribes "without their consent and regardless

---

[5] As this Court also stated in *Kennerly*, 91 S.Ct. at 481, before enactment of Title IV of the Civil Rights Act of 1968:

"state assumption of civil jurisdiction — in situations where Congress had not explicitly extended jurisdiction — was governed by § 7 of the Act of August 15, 1953, 67 Stat. 590." (footnote omitted)

of their needs or special circumstances." Title III of Senate Bill 1843, which later became Title IV of the 1968 Civil Rights Act, was intended to respond to that criticism by repealing Public Law 83-280 and by substituting therefor the Subcommittee's recommendation that there be "Tribal consent as a precondition of the State's assumption of jurisdiction . . . ." S.Rep.No. 841, 90th Cong., 1st Sess. 11-12 (1967).

The unilateral assertion here by Arizona of its income taxing power on the Navajo Reservation presents, then, the precise situation about which Tribal leaders had complained to Congress and which Congress, by enacting Title IV of the 1968 Civil Rights Act, intended to prohibit. That assertion of power should, therefore, fall because it conflicts with supreme federal law.

The State's assertion of power also conflicts with another federal law, § 20 of the Arizona Enabling Act, 36 Stat. 569 (1910), in which the State of Arizona forever disclaimed:

> ". . . all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished *the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States* . . . ." (Emphasis added).

Unlike the Arizona Court of Appeals, which found the disclaimer in Arizona's Enabling Act to deal with title to Indian land [*McClanahan v. State Tax Comm'n*, 14 Ariz.App. 452, 484 P.2d 221, 225 (1971)], this Court has referred to the disclaimer in the broader sense of denying the State jurisdiction. *Williams v. Lee*, 358 U.S. 217, 223, n. 10 (1959) ("Arizona has an express disclaimer of jurisdiction over Indian lands . . . .") See also *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 686-87 (1965).

Although this Court concluded that the provisions in Alaska's Enabling Act were not intended "to oust the State completely from regulation of Indian 'property (including fishing rights)' ", *Organized Village of Kake v. Egan*, 369 U.S. 60, 71 (1962), that statement, applied to non-reservation Indians, was prompted by legislative history showing that Alaska was not to be deprived of political jurisdiction. *Id.* at 69-71.

The classic pronouncement by this Court on the effect of a disclaimer is that in the *Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867). There, explaining that the State of Kansas could not tax real property held in trust for the Shawnee Indians, the Court referred to the provisions of the Kansas Enabling Act, stating:

> "If under the control of Congress, from necessity, there can be no divided authority. . . . There can be no question of state sovereignty in the case, as Kansas accepted her admission into the family of states on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union." *Id.* at 755-756.

Arizona's assertion of taxing power on the Navajo Reservation also conflicts with the congressional policy expressed in the Buck Act, 61 Stat. 641 (1947), 4 U.S.C. §§ 101-110 (Supp. 1971). Congress there defined the term "Federal area" to mean "any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States . . . ." 25 U.S.C. § 110(e) (Supp. 1971). Although the Buck Act permits states to levy and collect income taxes within a federal area [4 U.S.C. § 106(a) (Supp. 1971)], the Act specifically denies states authorization for "the levy or collection of any tax on or from any Indian not otherwise taxed." 4 U.S.C. § 109 (Supp. 1971). Referring to decisions about the impact of the Buck Act on state taxing power over Indian reservations, this Court approved as "correct" an interpretation denying states con-

gressional authorization to levy and collect taxes on Indian reservations. *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 691 n. 18 (1965).

As this Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) and Congress' enactment of the Buck Act confirmed, Indian reservations are federal enclaves. The decisions involving state taxes within federal enclaves hold that a state may not levy its taxes within a federal enclave without congressional authorization. *Humble Pipeline Co. v. Waggonner*, 376 U.S. 369 (1964) (invalid Louisiana ad valorem tax on privately owned property on an Air Force field); *Mississippi River Fuel Corp. v. Cocreham*, 382 F.2d 929 (5th Cir. 1967), *cert. denied*, 390 U.S. 1014 (1968). *Cf. Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938) (state could not regulate activities on land ceded to the United States); *United States v. Kagama*, 118 U.S. 375 (1886) (state could not try reservation Indians for criminal offenses). As this Court explained in *Humble Pipeline Co. v. Waggonner, supra:*

> "When Congress has wished to allow a state to exercise jurisdiction to levy certain taxes within federal enclaves, it has specifically so stated, as in the Buck Act, 4 U.S.C. §§104-10." 376 U.S. at 374.

CONCLUSION

Without congressional authorization and without the consent of the Navajo people to be affected, the State of Arizona unilaterally sought to apply its income tax laws to individual Navajos on the Navajo Reservation. In so doing, the State completely ignored the exclusive procedure provided by Congress in Title IV of the 1968 Civil Rights Act. The State also ignored the congressional policies forbidding state intrusion in the affairs of reservation Indians as evidenced by the Buck Act and the Arizona Enabling Act. Since the decisions of this Court require states to conform with the provisions of applicable supreme federal law, the State's assertion of power here should not be allowed to stand. The judgment of the

state courts dismissing Appellant's complaint was, therefore, erroneous and should be reversed.

Respectfully submitted,

GEORGE E. HILTY
222 North Central Avenue
Phoenix, Arizona 85004
Attorney for Amicus Curiae

Of Counsel:

GEORGE P. VLASSIS
BRUCE E. BABBITT
BROWN, VLASSIS & BAIN
January 21, 1972

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-834

ALENE McCLANAHAN, on behalf of herself and all others similarly situated, *Appellant*,

vs.

ZONA STATE TAX COMMISSION, *Appellee*.

On Appeal from the Supreme Court of Arizona

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

INTRODUCTION

Pursuant to Rule 16(4) of the Rules of the Supreme t of the United States, appellant herewith files a brief pposition to appellee's motion to dismiss or affirm. ellee takes the position that the questions presented to Court have already been resolved in appellee's favor by ous decision of this Court and therefore no substantial al question has been presented. On the contrary, the ons relief upon by appellee affirmatively show that estion of state taxation of the income of Indians re- and working on an Indian Reservation is still open has not been decided by this Court.

I. PRIOR DECISIONS DO NOT CONTROL THIS CASE

Appellee relies upon *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936), and *Choteau v. Burnet*, 283 U.S. 691 (1931), in support of its assertion that the State of Arizona may tax the income of Reservation Indians in view of Arizona's providing services to the Indians. These three cases arise out of the peculiar and singular Indian-state relationship in Oklahoma and are not applicable to appellant's situation in Arizona. They are fully discussed and distinguished in the Jurisdictional Statement, pp. 14-17. Since the status of Oklahoma Indians is substantially different from that of reservation Indians in Arizona, it is significant that appellee does not support its argument with an analysis demonstrating the applicability of those decisions, despite the disparate and discrete situations of Indians in both states. No such analysis can be made. The Oklahoma cases do not control, and this question is one of first impression for the Court. Cf. *American Federation of Musicians v. Wittstein*, 379 U.S. 171 (1964).

Appellee's reliance upon the two New York cases, *Powless v. State Tax Commission*, 44 App. Div.2d 746, 253 N.Y.S. 2d 438 (1964) and *State Tax Commission v. Barnes*, 14 Misc.2d 311, 178 N.Y.S. 2d 932 (Franklin Co. Ct. 1958) is similarly misplaced, since Congress has expressly conferred jurisdiction over Indian reservations upon the state of New York. *See* 25 U.S.C. §§232-233; *see also*, F. Cohen, Handbook of Federal Indian Law, ch. 22 (1942).

Moreover, no analogy can be drawn between the federal-state dual sovereignty tax cases, *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939) and *Helvering v. Gerhardt*, 304 U.S. 405 (1938), and the situation in this case

since an Indian reservation does not derive any governmental power from a state. *Toledo v. Pueblo de Jemez*, 119 F. Supp. 429 (D.N.M. 1954); cf. *Williams v. Lee*, 358 U.S. 217, 220-223 (1958).

Nor does *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949) help appellee's position, since it upheld the validity of nondiscriminatory state gross production and excise taxes on petroleum produced by a *non-Indian* lessee from protected Indian land. Moreover, although *Alabama v. King & Boozer*, 314 U.S. 1 (1941) sustained the validity of a state sales tax applied to a contractor doing work for the federal government, the effect of the tax on governmental operations was oblique and indirect, whereas a county personal property tax on mineral rights belonging to the Federal Land Bank was voided because of its direct effect on governmental operation and policy in *Federal Land Bank v. Board of County Commissioners*, 368 U.S. 146 (1961).

Both appellee and the court below contend that the tax does not violate tribal sovereignty because its incidence falls upon the individual rather than on the Navajo Tribe, *McClanahan v. State Tax Comm'n*, 14 Ariz. App. 452, 454-455, 484 P.2d 221, 223-224 (1971); Appellee's Motion to Dismiss or Affirm, pp. 15-16. This is untenable in the light of the fact that the Montana Court's rationale that a grocery debt is a private matter in *State ex rel. Kennerly v. District Court*, 154 Mont. 488, 466 P.2d 85 (1970) was implicitly rejected by this Court when it reversed that decision in *Kennerly v. Montana District Court*, 400 U.S. 423 (1971).

Likewise, both the court below and appellee cite *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), for the proposition that state laws can be extended over Indian lands. But neither the court of appeals nor appellee quotes the following language from that case's opinion:

> These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law.

319 U.S. at 75. Arizona's arrogation of the taxing power over reservation Indians necessarily implies a diminution of tribal sovereignty and self-government, a right reserved to the Indians by federal law.

II. SUBSTANTIAL FEDERAL QUESTIONS ARE RAISED BY THIS APPEAL

Appellee has not explained why the questions presented are not "so substantial as to require plenary consideration," Rule 15(1)(f) of the Supreme Court of the United States, since the decisions it relies upon are inappropriate. Even assuming that the decisions cited are applicable, this Court has noted probable jurisdiction to re-examine past decisions "[i]n view of the growing nation-wide importance of the problem." *Camara v. Municipal Court*, 387 U.S. 523, 525 (1967).

In addition, the Navajo Tribe of Indians has moved to intervene as *amicus curiae*. Although one of the principal bases of decision in the lower court is the Arizona income tax's non-interference with tribal self-government, the Navajo Tribe is opposed "to unilateral state assertion of jurisdiction over Indian reservations, without the consent of the Indians affected," as manifested by the decision below. Brief of the Navajo Tribe of Indians as Amicus Curiae, in Support of Jurisdictional Statement, p. 3. Moreover, the Tribe "believes that the application of Arizona's income tax laws to its people and its Reservation will have an untoward economic impact not considered by the Arizona tax-

ing authorities or the Arizona courts." *Id.*, p. 2. *In Kennerly v. Montana District Court*, 400 U.S. 423 (1971), Mr. Justice Stewart stated in dissent that it was against "the most basic principles of fair play" for this Court to decide a question directly affecting tribal-state relations "without first giving the [Blackfeet Tribal] Council an opportunity at least to submit a brief in support of its legislation." 400 U.S. at 432. The Navajo Tribe's intervention as *amicus* gives the Court the benefit of its views on the questions presented by this case, questions which vitally affect the continued progress of the Tribe and its members towards self-determination and self-sufficiency.

Respectfully submitted,

DONALD JUNEAU
THEODORE R. MITCHELL
Counsel for Appellant

Dated: January 29, 1972

Of Counsel:

BRUCE BRIDEGROOM
STEPHEN A. HARVEY

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-834

ROSALIND McCLANAHAN, on behalf of herself and all others similarly situated,

Appellant,

vs.

ARIZONA STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of Arizona

SUPPLEMENTAL BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

INTRODUCTORY

Pursuant to Rule 16(5) of the Supreme Court of the United States, appellant herewith files a supplemental brief in opposition to appellees' motion to dismiss or affirm. The purpose of this brief is to draw attention to the Buck Act, 4 U.S.C. §§105-110, 61 Stat. 644-646 (1947), *as amended*, 68 Stat. 1227 (1954). Appellee states categorically that "no governing act of Congress is involved in this case" (Appellee's Motion to Dismiss or Affirm, p. 10), but the legislative history of the Buck Act set out below clearly shows that Congress intended to prevent state income taxes from being

levied on trust Indians. The Buck Act underlines the substantiality and importance of the federal questions presented to this Court by this appeal.

THE DECISION OF THE ARIZONA COURT OF APPEALS CONFLICTS WITH THE STATUTORY ALLOCATION OF TAXING AUTHORITY ESTABLISHED BY CONGRESS

The states are granted the authority to collect income taxes from residents of federal areas by 4 U.S.C. §106. However, Indians are expressly exempted from this authority by 4 U.S.C. §109.* (See Appendix). The legislative history of the Buck Act demonstrates (1) that It was intended as a complete allocation of taxing authority in this field to clear up confusion and ambiguity then thought to exist, and (2) that the Indian exemption in §109 was assumed by Congress and the state participants in the enactment of the Buck Act to protect Indians from state taxation.

Congressman Buck first introduced a bill to apply state sales and use taxes in all areas where the federal government "may have jurisdiction". H.R. 6687, 76th Cong. 1st Sess., 84 Cong. Rec. 6737 (1939). This bill passed the House (84 Cong. Rec. 10093) but not the Senate. The following year the Senate Finance Committee amended the bill to add state income taxes, to exempt sales by instrumentalities of the United States, and to exempt Indians. See Sen. Rpt. 1625, 76th Cong., 3d Sess. (1940); Hearings on H.R. 6687 before a Subcomm. of the Senate Comm. on Finance,

---

*Analogous grants of jurisdiction have been made in the areas of state sales and use taxes (4 U.S.C. §105); state gasoline taxes (4 U.S.C. § 104); and state unemployment compensation laws (26 U.S.C. §3305(d)). The express Indian exemption applies to sales and use taxes as well as income taxes. 4 U.S.C. §109.

76th Cong., 3d Sess. (Apr. 23, 1940). In this form the bill was passed and became the present 4 U.S.C. §§105-110.

A report prepared by Congressman Buck stated the purpose of the Act:

> Divergent views being expressed by taxpayers and taxing authorities makes [sic] it evident that prolonged and expensive litigation will be required to clarify the law on the subjct if the limits of state authority with respect to the various types of Federal areas are to be established through judicial decisions. This litigation and the period of uncertainty which will necessary [sic] exist pending final decisions by the United States Supreme Court may, however, be avoided through Congressional action. . .

Hearings, *supra*, p. 3.

Whether the grant of taxing authority should apply to Indian reservations was vigorously discussed. A spokesman for the states of California and Washington argued for the inclusion of Indian reservations in the Act. Hearings, *supra*, p. 12; see also the reference to Indian traders at Hearings, *supra*, p. 2. The Interior Department on the other hand sought the exclusion of Indian reservations. Letter from E. K. Burlew to Senate Finance Committee printed at 84 Cong. Rec. 10685 (1939); letter from Governor Miles of New Mexico, Hearings, *supra*, p. 2. But the provision enacted as 4 U.S.C. §109 followed the urging of a representative of New Mexico, set out at Hearings, *supra*, pp. 18-20. He urged the exemption of Indians but not of Indian reservations:

> . . . [W]e have no desire to tax the Indians. They are exempt from taxation in our State, but we do

> not believe that because a man establishes a store on Indian lands competing with a store outside, the store inside should be exempt from all taxation, and the store outside should pay.

Hearings, *supra*, p. 19.

Thus in the Buck Act Congress fully allocated state authority to levy income taxes on persons under federal jurisdiction, and trust Indians were expressly exempted.* Appellee's action in the present case conflicts with the act and should be reversed by this Court. See *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685, 691 n.18 (1956); *cf.*, *Humble Pipe Line Co. v. Waggoner*, 376 U.S. 368, 473: "When Congress has wished to allow a state to exercise jurisdiction to levy certain taxes within a federal enclave it has specifically so stated, as in the Buck Act, 4 U.S.C. §§104-110."

Respectfully submitted,

Donald Juneau
Richard B. Collins, Jr.
Theodore R. Mitchell
Stephen A. Harvey
Robert C. Ericson, Law Clerk

Counsel for Appellant

Dated: April , 1972

---

*That Congress has the Constitutional authority to exempt Indians is beyond question. *Choate v. Trapp*, 224 U.S. 665, 671 (1912); *see generally* F. Cohen, *Federal Indian Law*, c.13 (1943).

APPENDIX

The Buck Act, 4 U.S.C. §§105-110.

STATE, AND SO FORTH, TAXATION AFFECTING FEDERAL AREAS; SALES OR USE TAX

§105. (a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940.

SAME; INCOME TAG

§106. (a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or deriving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable

only with respect to income or receipts received after December 31, 1940.

SAME; EXCEPTION OF UNITED STATES, ITS INSTRUMENTALITIES, AND AUTHORIZED PURCHASES THEREFORM

§107. (a) The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of personnel of any branch of the Armed Forces of the United States, under regulations promulgated by the departmental Secretary having jurisdiction over such branch.

SAME; JURISDICTION OF UNITED STATES OVER FEDERAL AREAS UNAFFECTED

§108. The provisions of sections 105 to 110 of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area.

SAME; EXCEPTION OF INDIANS

§109. Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.

SAME; DEFINITIONS

§110. As used insections 105-109 of this title—

(a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.

(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term "State" includes any Territory or possession of the United States.

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.

61 Stat. 644-645 (1947), *as amended,* 68 Stat. 1227 (1954).

the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-834

...ND McCLANAHAN, ON BEHALF OF HERSELF AND ... OTHERS SIMILARLY SITUATED, APPELLANTS

v.

ARIZONA STATE TAX COMMISSION

...Y APPEAL FROM THE SUPREME COURT OF ARIZONA

...ANDUM FOR THE UNITED STATES AS AMICUS CURIAE

... memorandum is submitted in response to the ...t's order of February 22, 1972, inviting the Solic... General to express the views of the United States ... case.

... petitioner is an enrolled member of the Navajo ... of Indians. At all pertinent times she resided ... the portion of the Navajo Indian Reservation ... in the State of Arizona. Her income was "de... from sources within the confines of the Navajo ... Reservation." J.S. App. B p. 3a. The question ...ed is whether the State of Arizona has juris... to tax such income.

... has generally been accepted that, in the ab... of congressional authorization, the States have

no right to tax Indian property or income within a reservation.' However, as recent programs for Indian economic development have begun to take effect, some States have asserted jurisdiction to tax such property and income. See, generally, our brief in *Mescalero Apache Tribe*, v. *Jones*, No. 71–738, certiorari granted, April 24, 1972. See also *Tonasket* v. *State of Washington*, No. 71–1031. The question whether or under what circumstances a State may tax income earned within a reservation by Indians who live on the reservation therefore warrants the attention of this Court.

2. In *Worcester* v. *Georgia*, 6 Pet. 515, this Court held broadly that the laws of Georgia could have no force within the Cherokee reservation located in that State. The Court stated that "[t]he whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States." *Id.* at 561.

'U.S. Department of the Interior, *Federal Indian Law* (Cohen, 1958 rev.) 845–846:

> * * * State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian Reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress. Conversely Indian property outside of an Indian reservation is subject to State taxation unless congressional authority for a claim of tax exemption can be found. * * * [citing *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 651]. This is in contrast to federal taxation in which jurisdiction is clear and tax coverage is assumed unless there is a particular exemption in a treaty or statute. See *Squire* v. *Capoeman*, 351 U.S. 1.

Decisions subsequent to *Worcester* have established that a State may have jurisdiction over exclusively non-Indian activities occurring on a reservation. *United States* v. *McBratney*, 104 U.S. 621 (service of process on non-Indian living within reservation); *Draper* v. *United States*, 164 U.S. 240 (murder on reservation of one non-Indian by another non-Indian); *Utah and Northern Railway* v. *Fisher*, 116 U.S. [illegible] (state taxation of portion of railroad running through reservation on land ceded to the railroad). Additionally, Congress has provided a method for States to assume extensive jurisdiction within a reservation. See discussion of Public Law 280, Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. 1162, and 28 U.S.C. 1360, *infra*. However, subject to narrow exceptions, and in the absence of legislation granting jurisdiction to the States, the general inapplicability of state law within a reservation remains. *Williams* v. *Lee*, 358 U.S. 217, 219.[2]

Moreover, as this Court pointed out in *Williams*, "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." 358 U.S. at 220. When Congress has wished to permit the States to exercise jurisdiction within Indian reservations, it

[2] *Organized Village of Kake* v. *Egan*, 369 U.S. 60, while recognizing the rights of States to exercise jurisdiction over Indians, held only that non-reservation Indians living in Indian villages are bound by the State's conservation laws. Compare *Metlakatla Indians* v. *Egan*, 369 U.S. 45, a companion case to *Kake*, in which the Secretary of the Interior's exclusive authority over fishing within the Metlakatla reservation was upheld. Alaska, the State involved in both cases, has assumed jurisdiction within reservations under P.L. 280, *supra*.

has done so by particular statutes. See *Kennerly* v. *District Court of Montana*, 400 U.S. 423. For example, Congress granted certain States plenary jurisdiction over specified tribes by "termination" legislation enacted in the 1950's.[1] And Public Law 280, *supra*, provided a method by which any State which took specific steps to do so could bring Indian tribes within the jurisdiction of its criminal and civil courts. Under Public Law 280, as originally enacted, the States could assume such jurisdiction without the consent of the tribes affected. More recent legislation, however, has amended P.L. 280, in the interest of Indian self-government, to require the consent of the tribe before a State can assume jurisdiction and to permit retrocession of state jurisdiction acquired under the earlier law. Act of April 11, 1968, 82 Stat. 78, 25 U.S.C. 1321, *et seq.*

Similarly, when Congress has wished to extend to the States the right to tax Indians within a reservation it has done so by carefully delimited legislation. Thus 25 U.S.C. 398 specifically authorizes the States to tax mineral production on unallotted tribal land. And 4 U.S.C. 105–109 (the Buck Act), which permits the States to tax persons "residing within a federal area or receiving income from transactions occurring

[1] Klamath Tribe, 25 U.S.C. 564–564x; "mixed blood" Ute Indians, 25 U.S.C. 677–677aa; "Western Oregon" Indians, 25 U.S.C. 691–708; Alabama and Coushatta Indians of Texas, 25 U.S.C. 721–728; Paiute Indians of Utah, 25 U.S.C. 741–760; Wyandotte Tribe of Oklahoma, 25 U.S.C. 791–807; Peoria Tribe of Oklahoma, 2 U.S.C. 821–826; Ottawa Tribe of Oklahoma, 25 U.S.C. 841–853; Menominee Tribe of Wisconsin, 25 U.S.C. 891–902; Ponca Tribe of Nebraska, 25 U.S.C. 971–980; California rancherias, 72 Stat. 619, amended by 78 Stat. 390.

or services performed in such area" (4 U.S.C. 105, 106), specifically exempts Indians from the operation of the Act. 4 U.S.C. 109. See also *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 691.

Since Congress has passed no law authorizing state taxation of income earned by Indians within the Reservation involved in the present case, the decision below, upholding the authority of the State to impose such a tax, seems incorrect on this ground alone.

2. In any event, the decision below is inconsistent with the particular legal relationship that exists between the State of Arizona and the Navajo Indians. When Arizona was admitted to the Union it agreed that it does "forever disclaim all right and title to [Indian lands and] * * * the same shall * * * remain * * * under the absolute jurisdiction and control of the Congress of the United States * * *." Act of June 20, 1910, 36 Stat. 557, 569. See also *Warren Trading Post, supra*, 380 U.S. at 687. When Congress authorized States which were denied jurisdiction by their enabling Acts to assume civil and criminal jurisdiction over Indian Reservations within their boundaries, Arizona did not choose to do so. See *Williams, supra*, 358 U.S. at 222–223.[4] As this Court noted in *Williams*,

[4] In 1967, after Williams and before the amendment to P.L. 280, requiring Indian consent for an assumption of jurisdiction by a State, Arizona enacted two statutes asserting jurisdiction over "Indian tribal lands, reservations and allotments" for the enforcement of air and water pollution legislation. Laws of 1967, Ch. 2, Sec. 10, 36 Ariz. R.S. § 1801; Laws of 1967, Ch. 106, Sec. 2, 36 Ariz. R.S. § 1865. These limited statutes obviously are far less than a full assumption of civil and criminal jurisdiction under P.L. 280.

Arizona's reason for failing to accept jurisdiction is "possibly because the people of the State anticipate that the burdens accompanying such power might be considerable." *Id.* at 228. Where a State has not accepted such responsibility, we submit, it cannot, in the absence of specific congressional authorization, tax income earned within the reservation by Indian residents of the reservation.[1]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Erwin N. Griswold,
Solicitor General.

Kent Frizzell,
Assistant Attorney General.

Harry R. Sachse,
Assistant to the Solicitor General.

Edmund B. Clark,
Carl Strass,
Attorneys.

April 1972.

---

[1] We express no opinion in this brief on whether a State which obtains jurisdiction under P.L. 280 thereby obtains a right to tax within a reservation. See *Tonasket* v. *State of Washington*, *supra*.

U.S. GOVERNMENT PRINTING OFFICE: 1972

Arizona's reason for failing to accept jurisdiction possibly because the people of the State anticipated that the burdens accompanying such power might be considerable." Mat 221. Where a State has not accepted such responsibility, we submit it cannot, in the absence of specific congressional authorization, tax income earned within the reservation by Indian residents of the reservation.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

EDMUND B. CLARK,
CARL ESTES,
Attorneys.

APRIL, 1972.

We express no opinion in this brief on whether a State which obtains jurisdiction under P.L. 280 thereby obtains a right to tax within a reservation. See *Fowler v. Rhode & Ballington*, supra.

INDEX

	Page
Opinions Below	1
Grounds Upon Which Jurisdiction is Invoked	1
Question Presented	3
Statutes Involved	3
Statement of the Case	5
Summary of Argument	7
Argument	8
Conclusion	28

TABLE OF AUTHORITIES

CASES

Page

Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970) 10, 18

Boyer v. Shoshone-Bannock Indian Tribes, 92 Ida. 257, 441 P.2d 167 (1968) 17

Buster v. Wright, 135 F.2d 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) 17

Cherokee Nation v. Georgia, 5 Pet. 1 (1831) 2

Choate v. Trapp, 224 U.S. 665 (1912) ..... 28 n. 12

Commissioner of Taxation v. Brun, 286 Minn. 43, 174 N.W.2d 120 (1970) 20

Ex parte Crow Dog, 109 U.S. 556 (1883) 10

Donnelly v. United States, 228 U.S. 243 (1913) ..... 14, 21 n. 9

Draper v. United States, 164 U.S. 240 (1896) ..... 12-13, 14, 21 n. 9

Felix v. Patrick, 145 U.S. 317 (1892) 10-11

Graves v. New York ex rel. O Keefe, 306 U.S. 466 (1939) 18-19

Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948) 11

Helvering v. Gerhardt, 304 U.S. 405 (1938) 18-19

Humble Pipeline Co. v. Waggoner, 376 U.S. 379 (1964) 28

Industrial Uranium Co. v. State Tax Commission, 95 Ariz. 130, 387 P.2d 1013 (1963) 24

Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956) 10

TABLE OF AUTHORITIES (Continued)

CASES

	Page
The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867)	2, 10, 24
Kennerly v. District Court, 400 U.S. 423 (1971)	2, 19, 23, 24
Langford v. Monteith, 102 U.S. 145 (1880)	16
Leahy v. State Treasurer of Oklahoma, 297 U.S. 420 (1936)	19
Maricopa & Phoenix R.R. v. Arizona, 156 U.S. 347 (1895)	15
McClanahan v. Arizona Tax Commission, 14 Ariz.App. 452, 464 P.2d 221 (1971)	2, 6, 18, 19, 24
Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906)	15
Morris v. Hitchcock, 194 U.S. 384 (1904)	17
New York ex rel. Ray v. Martin, 326 U.S. 469 (1946)	12 n. 4, 13 n. 5
Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943)	19-20
Organized Village of Kake v. Egan, 369 U.S. 60 (1962)	20
Rice v. Olson, 324 U.S. 786 (1945)	10, 16
State ex rel. Kennerly v. District Court, 154 Mont. 488, 466 P.2d 85 (1970), *judgment vacated sub. nom., Kennerly v. District Court*, 400 U.S. 423 (1971)	19
Thomas v. Gay, 169 U.S. 264 (1898)	15
United States v. Candeleria, 271 U.S. 432 (1926)	11
United States v. Chavez, 290 U.S. 357 (1933)	14

TABLE OF AUTHORITIES (Continued)

CASES

Page

United States v. Forness, 125 F.2d 928, (2d Cir.), *cert. denied sub. nom. City of Salamanca v. United States*, 316 U.S. 694 (1942).. 10

United States v. Kagama, 118 U.S. 375 (1886)..... 9

United States v. McBratney, 104 U.S. 621 (1882) .....12, 13 n. 5, 14, 21 n. 9

United States v. Pelican, 232 U.S. 442 (1914) 14

United States v. Ramsey, 271 U.S. 467 (1926)..... 14

Utah and Northern Ry. v. Fisher, 116 U.S. 28 (1885) 14-15

Wagoner v. Evans, 170 U.S. 558 (1898) 15

Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965) 2, 22, 27, 28

Williams v. Lee, 358 U.S. 217 (1959) 2, 10, 14, 15, 16, 18, 20, 21, 22, 28

Williams v. United States, 327 U.S. 711 (1946) 14

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 2, 8-9, 10, 12, 15-16, 22

Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 637, 361 P.2d 950 *cert. denied* 368 U.S. 915 (1961) 27

TREATIES AND STATUTES

	Page
9 Stat. 974 (1850)	7, 18 n. 7
15 Stat. 667 (1868)	2, 5-6, 7, 18
36 Stat. 569 §20 (1910)	5, 21
54 Stat. 1059 (1940), re-enacted and codified as 4 U.S.C. §§ 105-110	25
67 Stat. 588 (1953)	22
82 Stat. 78-80 (1968)	22
4 U.S.C. §§104-110	28
4 U.S.C. §§105-110	7, 25
4 U.S.C. §105	25 n. 11
4 U.S.C. §106	3
4 U.S.C. §109	3, 7, 25, 26, 27
18 U.S.C. §1152	13 n. 5
25 U.S.C. §231	24
25 U.S.C. §398	24
25 U.S.C. §§1321-1326	22, 24
25 U.S.C. §1322(a)	3, 22 n. 10
25 U.S.C. §1323(b)	23
25 U.S.C. §1324	4, 23
25 U.S.C. §1326	23
26 U.S.C. §3305(d)	25 n. 11
28 U.S.C. §1257(2)	2
Public Law 280, 67 Stat. 588 (1953)	4-5, 22-23, 24
REV. STAT. §2145 (18 U.S.C. §1152)	13 n. 5

OTHER AUTHORITIES

Page

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942) (U.N. Mex. Press reprint 1971) 9, 11, 17, 20, 27

F. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO.L.J. 1 (1942).... 15

Comment, *Indian Battle for Self-Determination*, 58 CALIF.L.REV. 465 (1970) 15

Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 CALIF.L.REV. 1261 (1971)... 20

Comment, *The Power of a State to Impose an Income Tax on Reservation Indians*, 6 WILLAMETTE L.J. 515 (1970) 20

Comment, *State Taxation of Indian Income*, 2 LAW AND SOCIAL ORDER (ARIZ.ST.L.J.355) (1971).... 20

84 CONG.REC. 6737 (1939) 25

84 CONG.REC. 10093 (1939) 25

DAVIS, *Criminal Jurisdiction over Indian Country in Arizona*, 1 Ariz. L. Rev. 62, 70 (1959) .....13 n. 5

H.R. 6687, 76th Cong., 1st Sess. (1939) 25

H.REP. No. 846, 83d Cong., 1st Sess., 2 (1953) U.S. Code, Cong. & Admin. News 2409, 2412 23

Hearings on H.R. 6687 Before the Senate Comm. on Finance, 76th Cong. 3d Sess. (Apr. 23, 1940) 25, 26

Hearings on H.R. 9417 Before a Sen. Comm. on Appropriations, 92nd Cong., 1st Sess., part 1, 751-755 (1971) 27

Note, *State Taxation on Indian Reservations*, 1966 UTAH L.REV. 132 (1966) .....20, 21 n. 9

S.REP. No. 1625, 76th Cong. 3rd Sess. (1940)..... 25

U.S. DEPT. OF THE INTERIOR, FEDERAL INDIAN LAW, (U.S.Gov't.Pr.Off. 1958) 9, 17

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-834

ROSALIND McCLANAHAN, on behalf of herself and all others similarly situated, *Appellant,*

vs.

ARIZONA STATE TAX COMMISSION, *Appellee.*

On Appeal from the Supreme Court of Arizona

BRIEF FOR APPELLANT

OPINIONS BELOW

The September 21, 1971, order of the Supreme Court of the state of Arizona denying appellant's petition for review is not reported but is set in Appendix A, at p. 1a, of appellant's Jurisdictional Statement. The opinion of the Arizona Court of Appeals is reported at 14 Ariz. App. 452,484 P.2d 221, and is set out in Appendix B, at p. 2a of appellant's Jurisdictional Statement. The opinion of the Superior Court of the state of Arizona in and for Apache County is not reported, but is set out in Appendix C, p. 11a of appellant's Jurisdictional Statement.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is a claim for refund of income tax paid during the calendar year 1967 brought under Ariz. Rev. Stat. Ann. §43-186(d) in the Superior Court of the State of Arizona in and for Apache County. Appellant contends that the assess-

ment, imposition and collection of the Arizona state income is invalid because (1) she is a Navajo Indian; (2) she resided at all material times within the confines of the Navajo Indian Reservation; and (3) her income during 1967 was derived from sources within the Navajo Indian Reservation, making the state statute invalid because it conflicts with the Treaty of 1868 between the United States and the Navajo Tribe. The Superior Court dismissed her complaint, holding that the applicability of the Arizona income tax laws against her was not violative of the federal government's responsibilities as trustee for the Indians nor did it interfere with tribal self-government. On appeal, the Arizona Court of Appeals affirmed the Superior Court's dismissal holding that the Arizona income tax law was validly applied to plaintiff, despite the Treaty of 1868, and the Supreme Court of Arizona denied appellant's petition for review of the judgment of the Court of Appeals.

(ii) The judgment sought to be reviewed is the order of the Supreme Court of Arizona denying appellant's petition for review entered on September 21, 1971. No opinion was filed. The Notice of Appeal was filed in the Superior Court of the State of Arizona in and for Apache County, the Court possessed of the record, on October 4, 1971.

(iii) Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. §1257(2).

(iv) Cases sustaining the jurisdiction of this Court are:

Kennerly v. Montana District Court, 400 U.S. 423 (1971);

Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965);

Williams v. Lee, 358 U.S. 217 (1959);

The Kansas Indians, 5 Wall. 737 (1867);

Worcester v. Georgia, 6 Pet. 515 (1832);

Cherokee Nation v. Georgia, 5 Pet. 1 (1831).

(v) The validity of Ariz. Rev. Stat. §43-102(a), as applied to appellant, is here involved. The full text of that provision is set out at pp. 3-4 of the Jurisdictional Statement.

QUESTION PRESENTED

Can the State of Arizona constitutionally apply a statute that imposes and collects taxes from the income of an Indian residing within the exterior boundaries of the Navajo Indian Reservation, without express Congressional authorization, and despite the Treaty of 1868 between the United States and the Navajo Tribe, and other Congressional enactments protective of Indian tribal sovereignty?

STATUTES INVOLVED

Section 20 of the Arizona Enabling Act, 36 Stat. 557, 569-70 (1910) is set out in pertinent part, at p. 21, n. 8, *infra*. Relevant portions of Buck Act are as follows:

§ 106. Same; income tax

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

* * * * * *

§ 109. Same; exception of Indians

Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed. (July 30, 1947, c. 389, § 1, 61 Stat. 641.)

4 U.S.C. 161 (1970). Section 402(a) of the Indian Civil Rights Act of 1968, 25 U.S.C. §1322(a) is set out at p. 22, n. 10.

Section 404 of the Indian Civil Rights Act of 1968, 25 U.S.C. §1324, provides as follows:

> Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.
>
> (Pub.L. 90-284, Title IV, § 404, Apr. 11, 1968, 82 Stat. 79.)

6 U.S.C. 6292 (1970).

Sections 6 and 7 of Public Law 280, 67 Stat. 588 (1953) provide as follows:

> SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.
>
> SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil

causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

67 Stat. 590.

STATEMENT OF THE CASE

Rosalind McClanahan, appellant herein, is a citizen of the United States and an enrolled member of the Navajo Tribe of Indians. During the 1967 calendar year, appellant resided within the exterior boundaries of the Navajo Indian Reservation, on that portion of the Reservation which is within the State of Arizona. Appellant's income during the 1967 calendar year was wholly derived from sources within the confines of the Navajo Indian Reservation. The total amount of tax withheld from appellant's income pursuant to Ariz. Rev. Stat. Ann. §43-188(f) amounted to $16.20. On April 1, 1968, appellant filed an Arizona State Individual Income Tax Return, a written protest against the collection of any tax on appellant's income by appellee, and a claim for refund for the entire sum withheld from her wages. No action was taken on appellant's claim for refund, so on October 4, 1968, appellant appealed her claim to appellee pursuant to Ariz. Rev. Stat. Ann §43-184(g). Appellee took no action on the claim. Thereafter appellant instituted a class action for refund in the Superior Court of Arizona in and for Apache County on June 17, 1969, pursuant to Ariz. Rev. Stat. Ann. §43-186(d). A.2. Appellee moved to dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted. A.1. Appellee based its position on the following premises: (1) the imposition of the income tax does not interfere with the self-government of the Navajo Tribe of Indians (2) the Arizona Enabling Act, 36 Stat. 557, 570 (1910) and the Arizona Constitution, Art. XX allow the State of Arizona to tax the income of Indians residing on a reservation; and (3) the Treaty of 1868 be-

tween the United States and the Navajo Tribe, 15 Stat. 667, does not contain any provision that would prohibit the imposition of the Arizona state income tax on that portion of the Navajo Indian Reservation within the boundaries of the State of Arizona.

Appellant in responding to appellee's assertions, contended that (1) absent an Act of Congress, Arizona has no power to tax appellant's income; (2) such arrogation of the income-taxing power by appellee would be violative of the right to self-government conferred on the Navajo Tribe of Indians by the Treaty of 1868; (3) and the Arizona Enabling Act and Article XX of the Arizona Constitution do not deprive the Navajo Tribe of the exclusive power to tax Indians but rather preclude the state of Arizona from applying its income tax laws to Indians residing on the Reservation.

The Superior Court dismissed appellant's complaint on January 12, 1970, holding that the state of Arizona did not require express congressional authority to tax appellant, and that the income tax imposed and collected by appellee did not interfere with tribal self-government. A.6. Appellant noticed an appeal to the Court of Appeals of the state of Arizona that same day. The Court of Appeals affirmed the Superior Court's dismissal of the complaint on April 28, 1971, and held that Arizona could validly apply its income tax statute on Indians residing and working on the Navajo Reservation without violating the Treaty of 1868 or the Enabling Act of Arizona. A.6,7; *McClanahan v. State Tax Commission*, 14 Ariz. App. 452, 484 P.2d 221. On May 11, 1971, appellant moved for a rehearing, which was denied on June 8, 1971. Appellant then filed a petition for review by the Supreme Court of Arizona on June 22, 1971, and said petition was denied on September 21, 1971. A.8. Appellant filed the Notice of Appeal to the Supreme Court of the United States in the Superior Court, the court possessed of the record, on October 4, 1971. A.1.

Appellant secured an extension of time to docket the appeal, which was due on December 20, 1971, and the

appeal was docketed on December 23, 1971. After inviting the Solicitor General to file a brief expressing the views of the United States on February 22, 1972, 40 U.S.L.W. 3398, this Court noted probable jurisdiction on May 15, 1972. 40 U.S.L.W. 3542.

SUMMARY OF ARGUMENT

Arizona has no jurisdiction to levy its income tax on Indians living and working on the Navajo Indian Reservation, because to do so would conflict with the federally protected right of the Navajo Tribe to control the internal affairs of its members. The Tribe's sovereignty derives from the Constitution and from its treaties with the United States, and it has been consistently recognized by decisions of this Court and by Acts of Congress.

State jurisdiction on Indian reservations has been allowed only pursuant to express Congressional enactment, or in cases where the persons and affairs of non-Indians are concerned. Congress has found it necessary to pass positive enactments allowing for the cession of federal protection and jurisdiction on Indian lands to the states. Arizona has failed to comply with these statutes and thus has not acquired jurisdiction to tax reservation Indians.

The correct rule as to state power on Indian reservations is that there is no state jurisdiction over the affairs of Indians, and there is state jurisdiction over non-Indians only where such does not infringe on the right of the Indians to govern themselves.

By enactment of the Buck Act, 4 U.S.C. §§105-110, Congress fully allocated taxing power on all federal lands including Indian reservations. Indians are expressly exempted by 4 U.S.C. §109.

The decision of the court below conflicts with governing federal law and should be vacated and remanded.

I

ARGUMENT

I. THE STATE OF ARIZONA HAS NO JURISDICTION TO TAX RESERVATION NAVAJOS, BECAUSE THE NAVAJO RESERVATION IS A SEPARATE SOVEREIGNTY.

The sovereign right of the Navajo Tribe to control the internal affairs of its members has been consistently recognized by treaties with the United States, by Acts of Congress, and by numerous decisions of this Court. Arizona's imposition of its state income tax on plaintiff, a Navajo living and working on the Navajo Reservation, is manifestly inconsistent with this governing body of law.

A. *Historical Development.*

In the case of *Worcester v. Georgia,* 31 U.S.(6 Pet.) 515 (1832), Mr. Chief Justice Marshall first set down the principles which govern federal-state-tribal relationships. The Court held invalid a series of Georgia statutes by which the state sought to exercise jurisdiction over the domain of the Cherokee Nation:

> . . . the acts of Georgia are repugnant to the Constitution, laws, and treaties of the United States.
>
> They interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union.
>
> They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself.

> They are in equal hostility with the acts of Congress for regulating this intercourse, and giving effect to the treaties.

Id. at 561-562.

The basis for this holding was the conclusion, based on a learned analysis of the course of the country's relations with the Indian tribes, that the entire responsibility for dealing with Indian tribes was vested in the federal government, rather than the states, by the Constitution.[1]

> That instrument [the Constitution] confers on Congress the powers of war and peace: of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians.

Id. at 559.

Consequently, any exercise of state jurisdiction over the Indians or their internal affairs was pre-empted by the fact that the full responsibility in this area had been entrusted by the Constitution to the federal government and that the treaties with the Indian tribes recognized their exclusive sovereignty over their own internal affairs.

The principles laid down in this decision are widely recognized as the basic authority in the field of state-Indian relations. U. S. Dept. of the Interior, FEDERAL INDIAN LAW (U.S. Gov't.Pr.Off.1958) pp. 501-505.[2] The *Worcester v. Georgia* holding has been consistently followed by the federal courts. See, *e.g.*, *United States v. Kagama*, 118 U.S. 375

---

[1]It is significant in this respect that whereas the Articles of Confederation had prohibited any exercise of federal Indian authority that would infringe upon the legislative power of any state, this limitation was removed by the Constitution. *Worcester v. Georgia*, 31 U.S.(6 Pet.) at 559.

[2]FEDERAL INDIAN LAW (1958) is a revised version of F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (U.S.Gov't Pr. Off. 1942).

(1886); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *The Kansas Indians*, 72 U.S.(5 Wall.) 737 (1867); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 983 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied sub nom. City of Salamanca v. United States*, 316 U.S. 694 (1942). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945).

In *Williams v. Lee*, 358 U.S. 217 (1959), this Court restated the principles of *Worcester v. Georgia, supra*, in light of subsequent history. Mr. Justice Black, speaking for the *Williams* court, began his analysis by reiterating the *Worcester* proposition that the whole intercourse with Indian Nations is vested in the government of the United States and that state laws have no force and effect within territory which is under the jurisdiction of an Indian nation. He then pointed out that:

> [the] broad principles of that decision came to be accepted as law. [Citations omitted.] Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of the Indians would not be jeopardized, but the basic policy of *Worcester* has remained.

Id. at 219.

In elaborating upon those areas in which the policy of *Worcester* had been modified, the *Williams* court referred to three separate lines of cases. It is evident from an analysis of these three lines of cases that they represent modifications of Worcester's broad territorial notion of Indian tribal jurisdiction but leave the role of the federal government *vis à vis* Indian tribes unchanged.

The first line of cases dealt with in *Williams, supra*, involves the proposition that an Indian can sue an outsider in state court. Mr. Justice Black cites *Felix v. Patrick*, 145 U.S.

> They are in equal hostility with the acts of Congress for regulating this intercourse, and giving effect to the treaties.

Id. at 561-562.

The basis for this holding was the conclusion, based on a learned analysis of the course of the country's relations with the Indian tribes, that the entire responsibility for dealing with Indian tribes was vested in the federal government, rather than the states, by the Constitution.[1]

> That instrument [the Constitution] confers on Congress the powers of war and peace: of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians.

Id. at 559.

Consequently, any exercise of state jurisdiction over the Indians or their internal affairs was pre-empted by the fact that the full responsibility in this area had been entrusted by the Constitution to the federal government and that the treaties with the Indian tribes recognized their exclusive sovereignty over their own internal affairs.

The principles laid down in this decision are widely recognized as the basic authority in the field of state-Indian relations. U. S. Dept. of the Interior, FEDERAL INDIAN LAW (U.S. Gov't.Pr.Off.1958) pp. 501-505.[2] The *Worcester v. Georgia* holding has been consistently followed by the federal courts. See, *e.g.*, *United States v. Kagama*, 118 U.S. 375

---

[1]It is significant in this respect that whereas the Articles of Confederation had prohibited any exercise of federal Indian authority that would infringe upon the legislative power of any state, this limitation was removed by the Constitution. *Worcester v. Georgia*, 31 U.S.(6 Pet.) at 559.

[2]FEDERAL INDIAN LAW (1958) is a revised version of F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (U.S.Gov't Pr. Off. 1942).

(1886); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *The Kansas Indians*, 72 U.S.(5 Wall.) 737 (1867); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 983 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied sub nom. City of Salamanca v. United States*, 316 U.S. 694 (1942). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945).

In *Williams v. Lee*, 358 U.S. 217 (1959), this Court restated the principles of *Worcester v. Georgia*, *supra*, in light of subsequent history. Mr. Justice Black, speaking for the *Williams* court, began his analysis by reiterating the *Worcester* proposition that the whole intercourse with Indian Nations is vested in the government of the United States and that state laws have no force and effect within territory which is under the jurisdiction of an Indian nation. He then pointed out that:

> [the] broad principles of that decision came to be accepted as law. [Citations omitted.] Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of the Indians would not be jeopardized, but the basic policy of *Worcester* has remained.

Id. at 219.

In elaborating upon those areas in which the policy of *Worcester* had been modified, the *Williams* court referred to three separate lines of cases. It is evident from an analysis of these three lines of cases that they represent modifications of Worcester's broad territorial notion of Indian tribal jurisdiction but leave the role of the federal government *vis à vis* Indian tribes unchanged.

The first line of cases dealt with in *Williams*, *supra*, involves the proposition that an Indian can sue an outsider in state court. Mr. Justice Black cites *Felix v. Patrick*, 145 U.S.

317 (1892), *United States v. Candelaria*, 271 U.S. 432 (1926), and *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948). While noting that the statements in these three cases about the competency of an Indian to sue in state court are dicta,[3] appellant nevertheless would concede the validity of this proposition. This proposition does not, however, involve any modification of the *Worcester* principle of federal preclusion of state jurisdiction over Indian affairs.

The controversy involved in this line of cases centered around the question of whether Indians, who were widely regarded as "wards" subject to the "guardianship" of the United States, were competent, in the sense of being *sui juris*, to file actions in state court. The conclusion of the courts in the cases cited by Justice Black was that they were. The principle involved in these cases has been summarized by Felix Cohen as follows:

> As a general rule, an Indian irrespective of his citizenship or tribal relations, may sue in any state court of competent jurisdiction to redress any wrong committed against his person or property outside the limits of the reservation.

FEDERAL INDIAN LAW, p. 372. *See also* p. 379.

---

[3]*Felix v. Patrick* and *U.S. v. Candelaria* both arose out of suits filed in federal courts, so there can be no doubt that the statements which they contain about the capacity of Indians to sue in state courts were dictum. *Harrison v. Laveen* was a case filed in state court by an Indian to seek a determination of an Indian's right to vote in Arizona elections. The case came to the Arizona Supreme Court on a motion to dismiss for failure to state a claim, so that the question of an Indian's right to sue was not directly before the court. Nevertheless, in the course of his opinion for the court, Mr. Justice Udall cited with approval the language from Felix Cohen's treatise *Federal Indian Law*, recognizing the federal preclusion of state jurisdiction over Indian affairs cited *infra* p. 17. Moreover, there can be no doubt that the principle was properly applied in the *Laveen* case since the issue in the case—the right of Indians to vote under Arizona law—is one which could and should be determined by the courts of Arizona.

It is clear from this that these cases make no inroad into the *Worcester* principle that state jurisdiction over Indian affairs on Indian reservations is totally pre-empted.

The second line of cases cited by Mr. Justice Black as effecting a modification of *Worcester* are those cases holding that state courts can try non-Indians who commit crimes against each other on a reservation.[4] This line of cases emanates from this Court's decision in *United States v. McBratney*, 104 U.S. 621 (1882). In *McBratney*, a non-Indian was indicted and convicted in Circuit Court of the United States for the District of Colorado, of the murder of another non-Indian within the boundaries of the Ute Reservation. The court agreed with McBratney's argument that the Federal Court lacked jurisdiction, and held that Colorado, upon admission to the Union on "equal footing" with the rest of the states, acquired criminal jurisdiction over non-Indians within its territory—including the Ute Reservation.

The same issue was again considered by this Court in *Draper v. United States*, 164 U.S. 240 (1896). The *Draper* facts were similar to those in *McBratney*, the main difference being that they took place in Montana. The defendant in *Draper*, in arguing that Montana state courts lacked jurisdiction over the crime of murder on an Indian reservation, attempted to distinguish *McBratney* on the grounds that the Montana Enabling Act contained a provision, not found in the Colorado Enabling Act, which provided that ". . . Indian lands shall remain under the absolute jurisdiction and control of the United States." The *Draper* Court followed *McBratney's* "equal footing" argument and maintained that an exception to state criminal jurisdiction should not be upheld unless no other interpretation of the statutory language was possible. The Court concluded that the language in the Enabling Act was not intended by Congress to bar state jurisdiction over a crime committed by one non-Indian

---

[4]Citing *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *United States v. McBratney*, 104 U.S. 621 (1882); *Draper v. United States*, 164 U.S. 240 (1896).

317 (1892), *United States v. Candelaria*, 271 U.S. 432 (1926), and *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948). While noting that the statements in these three cases about the competency of an Indian to sue in state court are dicta,[8] appellant nevertheless would concede the validity of this proposition. This proposition does not, however, involve any modification of the *Worcester* principle of federal preclusion of state jurisdiction over Indian affairs.

The controversy involved in this line of cases centered around the question of whether Indians, who were widely regarded as "wards" subject to the "guardianship" of the United States, were competent, in the sense of being *sui juris*, to file actions in state court. The conclusion of the courts in the cases cited by Justice Black was that they were. The principle involved in these cases has been summarized by Felix Cohen as follows:

> As a general rule, an Indian irrespective of his citizenship or tribal relations, may sue in any state court of competent jurisdiction to redress any wrong committed against his person or property outside the limits of the reservation.

FEDERAL INDIAN LAW, p. 372. *See also* p. 379.

---

[8]*Felix v. Patrick* and *U.S. v. Candelaria* both arose out of suits filed in federal courts, so there can be no doubt that the statements which they contain about the capacity of Indians to sue in state courts were dictum. *Harrison v. Laveen* was a case filed in state court by an Indian to seek a determination of an Indian's right to vote in Arizona elections. The case came to the Arizona Supreme Court on a motion to dismiss for failure to state a claim, so that the question of an Indian's right to sue was not directly before the court. Nevertheless, in the course of his opinion for the court, Mr. Justice Udall cited with approval the language from Felix Cohen's treatise *Federal Indian Law*, recognizing the federal preclusion of state jurisdiction over Indian affairs cited *infra* p. 17. Moreover, there can be no doubt that the principle was properly applied in the *Laveen* case since the issue in the case—the right of Indians to vote under Arizona law—is one which could and should be determined by the courts of Arizona.

It is clear from this that these cases make no inroad into the *Worcester* principle that state jurisdiction over Indian affairs on Indian reservations is totally pre-empted.

The second line of cases cited by Mr. Justice Black as effecting a modification of *Worcester* are those cases holding that state courts can try non-Indians who commit crimes against each other on a reservation.[4] This line of cases emanates from this Court's decision in *United States v. McBratney*, 104 U.S. 621 (1882). In *McBratney*, a non-Indian was indicted and convicted in Circuit Court of the United States for the District of Colorado, of the murder of another non-Indian within the boundaries of the Ute Reservation. The court agreed with McBratney's argument that the Federal Court lacked jurisdiction, and held that Colorado, upon admission to the Union on "equal footing" with the rest of the states, acquired criminal jurisdiction over non-Indians within its territory—including the Ute Reservation.

The same issue was again considered by this Court in *Draper v. United States*, 164 U.S. 240 (1896). The *Draper* facts were similar to those in *McBratney*, the main difference being that they took place in Montana. The defendant in *Draper*, in arguing that Montana state courts lacked jurisdiction over the crime of murder on an Indian reservation, attempted to distinguish *McBratney* on the grounds that the Montana Enabling Act contained a provision, not found in the Colorado Enabling Act, which provided that ". . . Indian lands shall remain under the absolute jurisdiction and control of the United States." The *Draper* Court followed *McBratney's* "equal footing" argument and maintained that an exception to state criminal jurisdiction should not be upheld unless no other interpretation of the statutory language was possible. The Court concluded that the language in the Enabling Act was not intended by Congress to bar state jurisdiction over a crime committed by one non-Indian

---

[4]Citing *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *United States v. McBratney*, 104 U.S. 621 (1882); *Draper v. United States*, 164 U.S. 240 (1896).

against the person of another non-Indian occurring on an Indian reservation.[5]

The opinions in *McBratney* and *Draper* were expressly limited to their facts, and decided nothing about jurisdiction

---

[5]The unique character of the kindred holdings in *McBratney, Draper* and *New York ex rel. Ray v. Martin* is demonstrated by the rather tortured reasoning they required. The statute upon which federal jurisdiction was sought to be based in these cases was §2145 of the Revised Statutes (now codified as 18 U.S.C. §1152) which provided:

> The general laws of the United States as to crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country.

The statute says nothing about the race of the perpetrator or victim, and appears to extend federal jurisdiction over all crimes committed in Indian Country. The effect of *McBratney* and its progeny was to carve out by judicial *tour de force* an exception to this plain statutory language. When the implications of §2145 were raised in *Martin,* the Court disposed of the issue summarily:

". . . the *McBratney* line of decisions stands for the proposition that States, by virtue of their statehood, have jurisdiction over such crimes notwithstanding §2145." *Id.* at 500. The Court went on to observe in a footnote that the statute was in force at the time of the *McBratney* decision, "Yet, significantly the Court did not even find it necessary to mention." *Id.* at 500 n.6. The latter statement is not quite correct, since the *McBratney* decision does mention §2145. See 104 U.S. at 621-22. However, the Court is correct in its suggestion that the *McBratney* opinion failed to deal with what appeared to be the plain intent of Congress in enacting the statute to extend federal jurisdiction over all crimes committed in Indian Country. One writer has essayed an historical interpretation for these judicial pyrotechnics.

> The *McBratney* and *Draper* decisions appear to be based on now discredited theories of states' rights; but they appear too well established in federal jurisprudence to be overruled. Davis, *Criminal Jurisdiction over Indian Country in Arizona,* 1 ARIZ. L.REV. 62, 70 (1959).

This view correctly suggests that the issue in these cases did not involve Indian affairs at all, but a conflict between the federal government and the states over jurisdiction of crimes involving only non-Indians, a matter which was of no special concern to the federal government, but one of great importance to the states in a period of emphasis upon state power.

over crimes by or against Indians or their property. This issue was decided in *Donnelly v. United States*, 228 U.S. 243 (1913), when this Court held that the federal court had jurisdiction over the murder of an Indian by a non-Indian in Indian country. The *Donnelly* Court rejected the defendant's contention that federal jurisdiction was precluded by *McBratney* and *Draper* and held that defendant, even though a non-Indian, was not subject to the jurisdiction of the state courts. *Accord, Williams v. United States*, 327 U.S. 711 (1946); *United States v. Chavez*, 290 U.S. 357 (1933); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Ramsey*, 271 U.S. 467 (1926). In *Williams v. United States, supra*, this court summarized the case law as follows:

> While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between *persons who are not Indians* . . . the laws and courts of the United States, *rather than those of Arizona*, have jurisdiction over offenses commited there, as in this case, by one who is not an Indian against one who is an Indian.

327 U.S. at 714. (emphasis added).

The third line of cases adverted to by Mr. Justice Black in *Williams v. Lee, supra*, is represented by his citation of *Utah & Northern Railway v. Fisher*, 116 U.S. 28 (1885). In that case, this Court upheld the power of the Territory of Idaho to tax the property of a railroad located on a strip of land which was within the exterior boundaries of an Indian reservation but which the Indians had ceded to the United States to be used for the railroad's right of way. The opinion sets forth two separate grounds for its decision upholding the tax. First, the reservation was within the geographical limits of the Territory and thus the state had some jurisdiction over the reservation—such jurisdiction being limited by the Treaty with the Indians that established the reservation. Second, the land in question had been withdrawn from the reservation as a result of the cession to the United States:

against the person of another non-Indian occurring on an Indian reservation.[5]

The opinions in *McBratney* and *Draper* were expressly limited to their facts, and decided nothing about jurisdiction

---

[5]The unique character of the kindred holdings in *McBratney, Draper* and *New York ex rel. Ray v. Martin* is demonstrated by the rather tortured reasoning they required. The statute upon which federal jurisdiction was sought to be based in these cases was §2145 of the Revised Statutes (now codified as 18 U.S.C. §1152) which provided:

> The general laws of the United States as to crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country.

The statute says nothing about the race of the perpetrator or victim, and appears to extend federal jurisdiction over all crimes committed in Indian Country. The effect of *McBratney* and its progeny was to carve out by judicial *tour de force* an exception to this plain statutory language. When the implications of §2145 were raised in *Martin*, the Court disposed of the issue summarily:

". . . the *McBratney* line of decisions stands for the proposition that States, by virtue of their statehood, have jurisdiction over such crimes notwithstanding §2145." *Id.* at 500. The Court went on to observe in a footnote that the statute was in force at the time of the *McBratney* decision, "Yet, significantly the Court did not even find it necessary to mention." *Id.* at 500 n.6. The latter statement is not quite correct, since the *McBratney* decision does mention §2145. See 104 U.S. at 621-22. However, the Court is correct in its suggestion that the *McBratney* opinion failed to deal with what appeared to be the plain intent of Congress in enacting the statute to extend federal jurisdiction over all crimes committed in Indian Country. One writer has essayed an historical interpretation for these judicial pyrotechnics.

> The *McBratney* and *Draper* decisions appear to be based on now discredited theories of states' rights; but they appear too well established in federal jurisprudence to be overruled. Davis, *Criminal Jurisdiction over Indian Country in Arizona,* 1 ARIZ. L.REV. 62, 70 (1959).

This view correctly suggests that the issue in these cases did not involve Indian affairs at all, but a conflict between the federal government and the states over jurisdiction of crimes involving only non-Indians, a matter which was of no special concern to the federal government, but one of great importance to the states in a period of emphasis upon state power.

over crimes by or against Indians or their property. This issue was decided in *Donnelly v. United States*, 228 U.S. 243 (1913), when this Court held that the federal court had jurisdiction over the murder of an Indian by a non-Indian in Indian country. The *Donnelly* Court rejected the defendant's contention that federal jurisdiction was precluded by *McBratney* and *Draper* and held that defendant, even though a non-Indian, was not subject to the jurisdiction of the state courts. *Accord, Williams v. United States*, 327 U.S. 711 (1946); *United States v. Chavez*, 290 U.S. 357 (1933); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Ramsey*, 271 U.S. 467 (1926). In *Williams v. United States, supra*, this court summarized the case law as follows:

> While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between *persons who are not Indians* . . . the laws and courts of the United States, *rather than those of Arizona*, have jurisdiction over offenses commited there, as in this case, by one who is not an Indian against one who is an Indian.

327 U.S. at 714. (emphasis added).

The third line of cases adverted to by Mr. Justice Black in *Williams v. Lee, supra*, is represented by his citation of *Utah & Northern Railway v. Fisher*, 116 U.S. 28 (1885). In that case, this Court upheld the power of the Territory of Idaho to tax the property of a railroad located on a strip of land which was within the exterior boundaries of an Indian reservation but which the Indians had ceded to the United States to be used for the railroad's right of way. The opinion sets forth two separate grounds for its decision upholding the tax. First, the reservation was within the geographical limits of the Territory and thus the state had some jurisdiction over the reservation—such jurisdiction being limited by the Treaty with the Indians that established the reservation. Second, the land in question had been withdrawn from the reservation as a result of the cession to the United States:

> The road and property thereupon became subject to the laws of the Territory relating to railroads, as if the reservation had never existed.

116 U.S. at 32. *Accord, Maricopa & Phoenix Railroad Co. v. Arizona*, 156 U.S. 347 (1895).

Utah & Northern Ry. Co. v. Fisher, supra, and the cases which it engendered (see *Thomas v. Gay*, 169 U.S. 264 (1898); *Wagoner v. Evans*, 170 U.S. 588 (1898); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906), can be grouped under the rubric of upholding state power to tax the property on non-Indians which happens to be located on an Indian reservation. None of them involved Indians or Indian interests, and none of them sanctions the exercise of state jurisdiction over the Indians themselves.

These three lines of cases then—the cases tending to show that Indians could file cases in state court, the cases sanctioning state jurisdiction over crimes on Indian Reservations involving only non-Indians, and the cases upholding the power of the state to tax the property of non-Indians located on Indian reservations—effected the modification of *Worcester* noted in *Williams v. Lee*. The operative effect of these modifications must however be viewed in light of *Williams'* maintenance that "the basic policy of *Worcester* has remained." 358 U.S. at 219.

The essence of the holding in *Worcester* was that "[t]he whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States." 31 U.S.(6 Pet.) at 561. In other words, since plenary power over Indian affairs is vested in the federal government, the states are pre-empted from acting in that area. See Comment, *Indian Battle for Self-Determination*, 58 CALIF. L.REV., 445, at 465; Felix Cohen, *"The Spanish Origin of Indian Rights in the Law of the United States,"* 31 GEO. L.J. 1 (1942). The secondary aspect of Mr. Chief Justice Marshall's analysis, based on an examination of the Treaties entered into with the Cherokees and other tribes up to 1832, was the conclusion that these treaties em-

bodied a policy of treating the territory of Indian reservations as being outside the limits of any state. 31 U.S.(6 Pet.) at 560. It was this second aspect of his analysis—the notion of tribal territorial sovereignty—which led him to his conclusion that the laws of Georgia could have no force within the geographic boundaries of the Cherokee Nation.

And it is this second aspect of Mr. Chief Justice Marshall's analysis which has been modified. Although his formulation was clearly correct at the time it was made, Indian lands gradually came to be considered as included within the territory of the state where they were located. And it is this factor which led this Court to sanction the extension of state jurisdiction onto Indian Reservations. *See e.g., Langford v. Monteith*, 102 U.S. 145 (1880). But the basic principle of *Worcester*, that the Indians themselves were subject to exclusive federal jurisdiction, did not change. The three lines of cases discussed above which sanction the extension of state jurisdiction over the person and property of non-Indians located in Indian Country, recognize the continued viability of this principle by taking care to note that the Indians are in no way affected by their holdings.

In *Williams v. Lee*, Mr. Justice Black reconciled the change in *Worcester's* preclusion of state jurisdiction over Indian territory with the continuance of *Worcester's* preclusion of state jurisdiction over Indians themselves when he concluded:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of Indians to make their own laws and be ruled by them.

358 U.S. 221.

The *Williams* test harmonizes the three lines of cases upholding state jurisdiction over non-Indians on the reservation with the fact that "[the] policy of leaving Indians free from state jurisdiction is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1944). Earlier Felix Cohen, the noted Indian law authority, offered the same—if somewhat more extensive—test for state jurisdiction:

> The road and property thereupon became subject to the laws of the Territory relating to railroads, as if the reservation had never existed.

116 U.S. at 32. *Accord, Maricopa & Phoenix Railroad Co. v. Arizona,* 156 U.S. 347 (1895).

Utah & Northern Ry. Co. v. Fisher, supra, and the cases which it engendered (see *Thomas v. Gay,* 169 U.S. 264 (1898); *Wagoner v. Evans,* 170 U.S. 588 (1898); *Montana Catholic Missions v. Missoula County,* 200 U.S. 118 (1906), can be grouped under the rubric of upholding state power to tax the property on non-Indians which happens to be located on an Indian reservation. None of them involved Indians or Indian interests, and none of them sanctions the exercise of state jurisdiction over the Indians themselves.

These three lines of cases then—the cases tending to show that Indians could file cases in state court, the cases sanctioning state jurisdiction over crimes on Indian Reservations involving only non-Indians, and the cases upholding the power of the state to tax the property of non-Indians located on Indian reservations—effected the modification of *Worcester* noted in *Williams v. Lee.* The operative effect of these modifications must however be viewed in light of *Williams'* maintenance that "the basic policy of *Worcester* has remained." 358 U.S. at 219.

The essence of the holding in *Worcester* was that "[t]he whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States." 31 U.S.(6 Pet.) at 561. In other words, since plenary power over Indian affairs is vested in the federal government, the states are pre-empted from acting in that area. See Comment, *Indian Battle for Self-Determination,* 58 CALIF. L.REV., 445, at 465; Felix Cohen, *"The Spanish Origin of Indian Rights in the Law of the United States,"* 31 GEO. L.J. 1 (1942). The secondary aspect of Mr. Chief Justice Marshall's analysis, based on an examination of the Treaties entered into with the Cherokees and other tribes up to 1832, was the conclusion that these treaties em-

bodied a policy of treating the territory of Indian reservations as being outside the limits of any state. 31 U.S.(6 Pet.) at 560. It was this second aspect of his analysis—the notion of tribal territorial sovereignty—which led him to his conclusion that the laws of Georgia could have no force within the geographic boundaries of the Cherokee Nation.

And it is this second aspect of Mr. Chief Justice Marshall's analysis which has been modified. Although his formulation was clearly correct at the time it was made, Indian lands gradually came to be considered as included within the territory of the state where they were located. And it is this factor which led this Court to sanction the extension of state jurisdiction onto Indian Reservations. *See e.g., Langford v. Monteith,* 102 U.S. 145 (1880). But the basic principle of *Worcester,* that the Indians themselves were subject to exclusive federal jurisdiction, did not change. The three lines of cases discussed above which sanction the extension of state jurisdiction over the person and property of non-Indians located in Indian Country, recognize the continued viability of this principle by taking care to note that the Indians are in no way affected by their holdings.

In *Williams v. Lee,* Mr. Justice Black reconciled the change in *Worcester's* preclusion of state jurisdiction over Indian territory with the continuance of *Worcester's* preclusion of state jurisdiction over Indians themselves when he concluded:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of Indians to make their own laws and be ruled by them.

358 U.S. 221.

The *Williams* test harmonizes the three lines of cases upholding state jurisdiction over non-Indians on the reservation with the fact that "[the] policy of leaving Indians free from state jurisdiction is deeply rooted in the Nation's history." *Rice v. Olson,* 324 U.S. 786, 789 (1944). Earlier Felix Cohen, the noted Indian law authority, offered the same—if somewhat more extensive—test for state jurisdiction:

> . . . [W]ithout questioning the constitutional doctrine that the states possess original and complete sovereignty over their own territories save insofar as such sovereignty is limited by the Federal Constitution, a sense of realism must compel the conclusion that control of Indian affairs has been delegated, under the Constitution, to the Federal Government and that state jurisdiction in any matters affecting Indians can be upheld only if one of two conditions is met: either that Congress has expressly delegated back to the state, or recognized in the state, some power of government respecting Indians; or that a question involving Indians involves non-Indians to a degree which calls into play the jurisdiction of a state government.

F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW, (1942) p.117 (U.N.Mex. Press reprint 1971). *See also* U.S. Dept. of the Interior, FEDERAL INDIAN LAW, *supra*, at pp. 501-505; 510-514.[6]

In summary, the legal rule derived from the prior decisions of this Court as to state jurisdiction on Indian reservations is that there is no state power over the affairs of the Indians, and there is state power over the affairs of non-Indians only to the extent that such jurisdiction does not infringe on the right of the Indians to govern themselves.

B. *Application to the Instant Case.*

In the case of Arizona's attempt to tax plaintiff, the three critical factors of situs, person, and subject matter (*see* FEDERAL INDIAN LAW, *supra* at p. 510) all point to exclusive Indian jurisdiction. The situs of all relevant events is the Navajo Reservation, plaintiff is Navajo, and the subject matter is within the jurisdiction of the Navajo Tribal Government. See *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F.2d 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906); *Cf., Boyer v. Shoshone Bannock Tribes*, 92 Ida. 257, 441 P.2d 167 (1968).

---

[6]See note 2 *supra* at 9.

Williams v. Lee, supra, also arose on the Navajo Reservation. This Court held that a Navajo was not subject to suit in state court based on a Reservation-incurred debt. The Court interpreted the treaty between the United States and the Navajo Tribe, 15 Stat. 667 (1868), to constitute federal recognition of the continuing right of Navajos to govern their own internal affairs. 358 U.S. at 221-222. Thus federal recognition of Navajo sovereignty antedates Arizona's statehood by 44 years.[7] The Tribe's authority over its own members under the treaty should be viewed as similar to that of a state over its residents. See *Arizona ex rel. Merrill v. Turtle,* 413 F.2d 983 (9th Cir. 1969), *cert. denied,* 396 U.S. 1003 (1970); *Buster v. Wright, supra.*

As developed in the last section, the governing legal rule as to state jurisdiction on Indian reservations is that there is no state power over the affairs of Indians, and there is state power over the affairs of non-Indians only to the extent that such jurisdiction does not infringe on the right of the Indians to govern themselves. The court below has perverted this rule by interpreting the *Williams v. Lee,* "infringement" language as sanctioning state invasion of the internal, on-reservation affairs of the Indians themselves. This is plainly inconsistent with the intent of the *Williams* decision as demonstrated by its historical development discussed above. The cases of *Helvering v. Gerhardt,* 304 U.S. 405 (1938) and *Graves v. New York ex rel. O'Keefe,* 306 U.S. 466 (1939), relied upon by the Court below, have no application to this case. The *Helvering* case held that an employee of the state government is liable to pay federal income taxes; *Graves* held that an employee of a federal instrumentality is liable to pay state income taxes. In each of those cases, persons clearly subject to the authority of the respective governments were seeking an exception to taxing authority as to *part* of their income based on the source of that income. They contended that the tax was in effect a tax on the source of the income, which source was con-

---

[7]Actually an earlier treaty constituted the first such recognition. 9 Stat. 974 (1850).

stitutionally not taxable. This Court rejected the notion that the taxes there at issue were levied on the source. However, in the instant case, the Indian residents of the Reservation are not subject to state authority in any respect as to their on-reservation affairs.

The Court below attempted to limit the federal recognition of Navajo sovereignty to the affairs of the Tribal Government as distinct from matters involving individual Indians. It then characterized the tax here at issue as "personal" and thus without the protection of Navajo sovereignty. 14 Ariz.App. at 454-5, 484 P.2d at 223-4. However, this Court rejected that approach to tribal-state relations by overruling a Montana Supreme Court case which had relied on that reasoning: *State ex rel. Kennerly v. District Court,* 154 Mont. 488, 466 P.2d 85 (1970), *judgment vacated sub. nom. Kennerly v. District Court,* 400 U.S. 423 (1971). The Montana Court had stated: "It is clear that a debt for a grocery bill is a personal matter and has no significance to Indian tribal matters." 154 Mont. at 494, 466 P.2d at 88. *Williams v. Lee, supra,* also involved the "personal" debt of an individual Navajo.

In developing its personal-tribal dichotomy, the Court below discussed three decisions of this Court which do not support its conclusion. In addition, these cases involve the affairs of Indians clearly distinguishable from the Navajos. *Leahy v. State Treasurer of Oklahoma,* 297 U.S. 420 (1936), upheld the power of the state to tax the income of an Osage Indian derived from his share of the income of the restricted mineral resources of the Tribe. *Oklahoma Tax Commission v. United States,* 319 U.S. 598 (1943) upheld the imposition of the state inheritance tax upon the transfer of the estates of three deceased members of the Five Civilized Tribes. In the latter case the Court specifically recognized the inapplicability of the principles of *Worcester v. Georgia* to the unique situation of the Oklahoma Indians:

> . . . these Indians have no effective tribal autonomy . . . and . . . they are actually citizens of the state with little to distinguish them from all other

citizens except for their limited property restrictions and their tax exemptions.

319 U.S. at 603. *Cf.*, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1942) Ch. 23 (U.N.Mex. Press reprint 1971). In *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), the issue was the applicability of Alaska's conservation laws off the reservation. None of the Indians involved in these three cases had a comprehensive tribal government ruling distinct territory as have the Navajos. *Cf., Williams v. Lee, supra*, 358 U.S. at 222. It is clear that the "situs" test discussed in FEDERAL INDIAN LAW, *supra*, at p. 510, is a critical determinant of state power over Indians. Thus the reliance on these three cases by the court below was plainly in error.

The Minnesota Supreme Court reached the opposite result to that of the court below in *Commissioner of Taxation v. Brun*, 286 Minn. 43, 174 N.W.2d 120 (1970). Red Lake Chippewas living and working on their reservation were held not subject to the Minnesota income tax. In addition, all commentators who have addressed the issue of state income taxes being levied on reservation Indians have concluded that the tax conflicts with tribal sovereignty as protected by the federal government and cannot constitutionally be collected. Comment, *State Taxation of Indian Income*, 2 LAW AND THE SOCIAL ORDER (Ariz.St.L.J.) 355 (1971); Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 CALIF.L.REV. 1261 (1971); Comment, *The Power of a State to Impose an Income Tax on Reservation Indians*, 6 WILLAMETTE L.J. 515 (1970); Note, *State Taxation on Indian Reservations*, 1966 UTAH L.REV. 132 (1966); *Cf.*, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1942) pp. 254, 262 (U.N.Mex.reprint 1971).

C. *Congressional Enactments.*

Through various statutory enactments, Congress has continued to recognize Indian sovereignty and exclusive federal jurisdiction and that the exercise of state jurisdiction over Indians is precluded without explicit Congressional authorization. Among these are the provisions for the retention of absolute federal jurisdiction and control over Indian lands

included in the Enabling Act for Arizona, as well as a number of other states.[8]

In *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), this Court interpreted the parallel language in the Alaska Enabling Act as follows:

> . . . the words "absolute jurisdiction and control" are not intended to oust the State completely from the regulation of Indian "property (including fishing rights)". "Absolute" in §4 carried the gloss of its predecessor statutes, *meaning undiminished*, not exclusive.

Id. at 71. (emphasis added). In other words, by the inclusion of this language in the state enabling acts, Congress intended to preserve its exclusive jurisdiction over Indian affairs, undiminished by the creation of a new state.[9] See *Williams v.*

---

[8]The pertinent language of the Arizona Enabling Act states:

> The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the deposition and under the absolute jurisdiction and control of the Congress of the United States. 36 Stat. 569, §20 (1910).

[9]The absolute federal jurisdiction and control language was first included in the Enabling Acts for the States of Montana, South Dakota, North Dakota, and Washington, all enacted in 1886. These were the first states admitted into the Union after this Court's decision in *United States v. McBratney, supra*, and suggest that Congress was responding to that decision, seeking to insure that the absolute federal jurisdiction over Indian affairs would not be diminished by the exercise of state jurisdiction without Congressional consent. See Note, "State Taxation on Indian Reservations," 1966 UTAH L.REV., 132, 133 (1966). This court subsequently interpreted that language as not precluding the exercise of state criminal jurisdiction over crimes involving only non-Indians occurring on Indian Reservations, *Draper v.* U.S., supra, but held a short time later that, *Draper* notwithstanding, federal jurisdiction in matters where Indians are involved remains exclusive. See *Donnelly v. United States, supra*, at 271-272. *Williams v. United States, supra*, at 714.

Lee, supra, at 222, n.10; *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685, 687, n.3 (1965) and see full discussion of *Worcester v. Georgia,* and its progeny, *supra,* pp. 8-9.

Public Law 280, 67 Stat. 587 (1953) and Subchapter III of the Indian Civil Rights Act of 1968, 25 U.S.C. §§1321-1326, 82 Stat. 78-80, manifest a continuing Congressional recognition of Indian sovereignty. *Williams v. Lee, supra,* 358 U.S. at 222 n.10. In Section 6 and 7 of Public Law 280, Congress deemed it necessary to give the consent of the federal government to states having express disclaimers of jurisdiction to acquire jurisdiction over Indian lands by repeal of such disclaimers.[10] If the court below were correct in its conclusion that the states have jurisdiction over reservation Indians unless specifically prohibited from doing so by Congress, the question naturally arises as to why Congress went to the trouble of enacting these statutes which gave the United States' consent to the acquisition of general jurisdiction over Indian lands. Public Law 280 would be a nullity, a futile exercise of the legislative will. The legislative history of Public Law 280 shows otherwise:

---

[10]The current statute relevant to this case is 25 U.S.C. 1322(a):

> The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians as to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, *and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.*" (Emphasis added).

> Examination of the Federal statutes and State constitutions has revealed that enabling acts for eight states, and in consequence the constitutions of those states, contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. Effect of the disclaimer of jurisdiction over Indian land within the borders of these States—in the absence of consent being given for future action to assume jurisdiction—is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; such States could, under the bill as reported, proceed to amendment of their respective organic laws by proper amending procedure.

H.Rep. No. 848, 83d Cong., 1st Sess., 2 1953 U.S. Code, Cong. & Admin. News 2409, 2412.

Thus Arizona was given an opportunity to assume jurisdiction over Indians, including the power to levy its income tax, by compliance with Public Law 280. But Arizona would have also had to decide to assume many of the responsibilities toward Indians now borne by either the federal government or the tribes themselves. Arizona declined to accept these responsibilities and did not amend its laws to comply with Public Law 280. Having failed to walk the path laid out by Congress, the state cannot assume taxing authority over Indians by other means. *Kennerly v. District Court, supra.*

Federal policy with respect to state acquisition of Indian jurisdiction was changed by the passage of the Indian Civil Rights Act of 1968, repealing section 7 of Public Law 280, which had given the consent of the United States to unilateral assumption of Indian jurisdiction by a state. 25 U.S.C. §1323(b). Now the Indians must also consent. 25 U.S.C. §1326. What was not changed was the fact that Congress still found it necessary to give an express consent to any state wishing to amend its organic law in order to acquire Indian jurisdiction. 25 U.S.C. §1324; *Cf., Kennerly*

v. District Court, supra. See generally the discussion of the Indian Civil Rights Act of 1968 in the Navajo Tribe's Brief *Amicus Curiae* in Support of the Jurisdictional Statement.

In the few instances where Congress has thought it necessary to vest certain facets of jurisdiction over Indians in the states, it has been specific; *e.g.*, 25 U.S.C. §231 (enforcement of state laws affecting health and education), 25 U.S.C. §398 (taxation of mineral leaseholds on Indian lands); see *Industrial Uranium Co. v. State Tax Commission*, 95 Ariz. 130, 387 P.2d 1013 (1963). No federal statute authorizes the collection of state income taxes from reservation Indians. In fact, the Buck Act, 4 U.S.C. §§105-110, does quite the opposite. See discussion under Argument II, *infra*. That Act is a further recognition by Congress of Indian sovereignty.

The court below stated that since "tax monies of the State of Arizona were being expended for education and welfare within the confines of the Navajo Reservation and that Navajo Indians were the beneficiaries of these expenditures", 14 Ariz.App. at 456-7, 484 P.2d at 225-6, Arizona has the correlative right to tax the incomes of the Indians. This Court rejected a similar "bootstrapping" argument in *The Kansas Indians, supra* at 757:

> Conferring rights and privileges upon these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of state laws.

In addition, the Arizona court's reasoning runs counter to Public Law 280 and the Indian Civil Rights Act, discussed above. These statutes provide an explicit and exclusive means for states to acquire jurisdiction over Indians. *Kennerly v. District Court, supra.*

II. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE STATUTORY ALLOCATION OF TAXING AUTHORITY ESTABLISHED BY CONGRESS.

By enactment of the Buck Act, 54 Stat. 1059 (1940), *re-enacted and codified,* as 4 U.S.C. §§105-110 (1947), Congress authorized the states to collect certain taxes from residents of federal areas. Authority to collect state income taxes is conferred by 4 U.S.C. §106. However, Indians are expressly exempted from this authority by 4 U.S.C. §109.[11] The legislative history of the Buck Act demonstrates (1) that it was intended as a complete allocation of taxing authority in this field, to clear up confusion and ambiguity then thought to exist, and (2) that the Indian exemption in §109 was assumed by Congress and the state participants in the enactment of the Buck Act to protect Indians from state taxation.

Congressman Buck first introduced a bill to apply state sales and use taxes in all areas where the federal government "may have jurisdiction". H.R. 6687, 76th Cong., 1st Sess., 84 CONG. REC. 6737 (1939). This bill passed the House (84 CONG. REC. 10093) but not the Senate. The following year the Senate Finance Committee amended the bill to add state income taxes, to exempt sales by instrumentalities of the United States, and to exempt Indians. See S.REP.No. 1625, 76th Cong., 3d Sess. (1940); *Hearings on H.R. 6687 before a Subcomm. of the Senate Comm. on Finance,* 76th Cong., 3d Sess. (Apr. 23, 1940). In this form the bill was passed and became the present 4 U.S.C. §§105-110.

A report prepared by Congressman Buck stated the purpose of the Act:

---

[11]The Buck Act also conferred jurisdiction in the area of state sales and use taxes, 4 U.S.C. §105. Analogous grants of jurisdiction have been made in the areas of state gasoline taxes, 4 U.S.C. §104, and state unemployment compensation laws, 26 U.S.C. §3305(d). The express Indian exemption applies to sales and use taxes as well as income taxes. 4 U.S.C. §109.

> Divergent views being expressed by taxpayers and taxing authorities makes [*sic*] it evident that prolonged and expensive litigation will be required to clarify the law on the subject if the limits of state authority with respect to the various types of Federal areas are to be established through judicial decisions. This litigation and the period of uncertainty which will necessary [*sic*] exist pending final decisions by the United States Supreme Court may, however, be avoided through Congressional action. . .

Hearings, supra, p. 3.

Whether the grant of taxing authority should apply to Indian reservations was vigorously discussed. A spokesman for the states of California and Washington argued for the inclusion of Indian reservations in the Act. *Hearings, supra,* p. 12; see also the reference to Indian traders at *Hearings, supra,* p. 2. The Interior Department on the other hand sought the exclusion of Indian reservations. Letter from E. K. Burlew to Senate Finance Committee printed at 84 CONG. REC. 10685 (1939); letter from Governor Miles of New Mexico, Hearings, *supra,* p. 2. But the provision enacted at 4 U.S.C. §109 followed the urging of a representative of New Mexico, set out at *Hearings, supra,* pp. 18-20. He urged the exemption of Indians but not of Indian reservations:

> . . . [W]e have no desire to tax the Indians. They are exempt from taxation in our State, but we do not believe that because a man establishes a store on Indian lands competing with a store outside, the store inside should be exempt from all taxation, and the store outside should pay.

Hearings, supra, p. 19.

The legislative history does not directly discuss the phrase in 4 U.S.C. §109 "Indians not otherwise taxed." However, the most sensible interpretation, consistent with the legislative history and with giving a logical meaning to the

statute, is that the phrase was intended to distinguish Indians under federal protection and control from those not. This would usually refer to reservation Indians as opposed to those residing elsewhere, but there are certain traditional trust areas outside of reservations whose residents are recognized as under federal protection. See *Hearings on H.R. 9417 before the Senate Comm. on Appropriations*, 92d Cong., 1st Sess., part 1 at 751-755 (1971).

The phrase in §109 resembles the phrase "Indians not taxed" in the Constitution and in many statutes. See discussion in F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1942).p. 157 (U.N.Mex. Press reprint 1971). There are no longer any Indians as to which this phrase is literally true (HANDBOOK OF FEDERAL INDIAN LAW, *supra* at p. 254), but one commentator as late as 1934 defined it as "probably meaning today Indians resident on reservations, that is, on land not taxed by the state." Rice, *The Position of the American Indian in the United States*, 16 J.COMP.LEG. 78 (1934), as quoted in HANDBOOK OF FEDERAL INDIAN LAW, *supra*, at p. 89.

4 U.S.C. §109 has been cited only once in a reported case, *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 691 n.18 (1956). That footnote in turn referred to *Your Food Stores, Inc. v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950 *cert. denied* 368 U.S. 915 (1961). Both cases dealt with taxation of non-Indians on Indian reservations, and neither interpreted 4 U.S.C. §109. (The New Mexico case did not even cite it.) The conclusion in the New Mexico case that the Buck Act was not intended to apply to non-Indians on Indian reservations seems plainly inconsistent with the legislative history of the Buck Act as set out above. Thus it is difficult to draw any conclusion from these decisions relevant to the instant case.

In the Buck Act, Congress fully allocated state authority to levy income taxes on persons under federal jurisdiction,

and trust Indians were expressly exempted.[12] The decision below and the actions of appellee here at issue conflict with the Buck Act, a "governing act of Congress." *Williams v. Lee, supra,* 358 U.S. at 221. State action inconsistent with a valid federal statute is invalid. *Warren Trading Post Co. v. Arizona Tax Commission, supra. Cf., Humble Pipe Line Co. v. Waggoner,* 376 U.S. 368, 373: "[W]hen Congress has wished to allow a state to exercise jurisdiction to levy certain taxes within a federal enclave it has specifically so stated, as in the Buck Act, 4 U.S.C. §§104-110."

CONCLUSION

For the above and foregoing reasons the judgment of the court below should be vacated and remanded.

Respectfully submitted,

DONALD JUNEAU
RICHARD B. COLLINS, JR.
ROBERT C. ERICSON
MICHAEL R. SERWATKA
Post Office Box 306
Window Rock, Arizona 86515

THEODORE R. MITCHELL
Post Office Box 826
Saipan, Mariana Islands 96950
Counsel for Appellant

Dated: June 28, 1972

---

[12]Congress clearly has the Constitutional authority to exempt trust Indians. *Choate v. Trapp,* 224 U.S. 665, 571 (1912); see generally HANDBOOK OF FEDERAL INDIAN LAW, *supra,* Ch. 13.

TABLE OF CONTENTS

	Page
Interest of Native American Rights Fund As Amicus Curiae	1
Argument	2
I. No Specific Act of Congress Authorizes the Taxation of Indian Income by the State of Arizona Nor Has Arizona Followed the Exclusive Statutory Procedure Provided by Congress to give Force and Effect to Its Income Tax Laws Within the Navajo Reservation	2
II. The Rule of Williams v. Lee Does Not Grant to States Jurisdiction Which Congress Has Withheld	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Commissioner of Taxation v. Brun, 286 Minn. 43, 174 N.W.2d 120 (1970)	5, 9
Donnelly v. United States 228 U.S. 243 (1913)	8
Draper v. United States, 164 U.S. 240 (1896)	8
Employment Security Dept. v. Cheyenne River Sioux Tribe, 80 S.D. 79, 119 N.W.2d 285 (1963)	5
Felix v. Patrick, 145 U.S. 317 (1892)	7
Kennerly v. Montana District Court, 400 U.S. 423 (1971)	5, 10
Langford v. Monteith, 102 U.S. 145 (1880)	8
Leahy v. State Treasurer of Oklahoma, 297 U.S. 420 (1936)	9
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)	3

Maricopa and Phoenix R. Co. v. Territory of Arizona, 156 U.S. 347 (1895) 8

Menominee Tribe v. United States, 391 U.S. 404 (1968) 4

Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962) 8

New York ex rel Ray v. Martin, 326 U.S. 496 (1946).. 8

Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943) 9

Organized Village of Kake v. Egan, 369 U.S. 60 (1962) 8-9

Thomas v. Gay, 169 U.S. 264 (1898) 8

United States v. Candaleria, 271 U.S. 432 (1926) 7

United States v. McBratney, 104 U.S. 621 (1882) 8

Utah & Northern Railway Co. v. Fisher, 116 U.S. 28 (1885) 8

Williams v. Lee, 358 U.S. 217 (1959) 5-8, 10

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 2-3, 6-7, 9-10

Federal Statutes:

Act of June 28, 1898, 30 State. 495 9

Public Law 280, Act of August 15, 1953, 67 Stat. 588, 589, 590 .....3-7, 10

18 U.S.C. § 1162 8

25 U.S.C. § 231 3

25 U.S.C. § 398c 3

25 U.S.C. § 1326 5

28 U.S.C. § 1360 8

Miscellaneous:

S. Rep. No. 699, 83 Cong., 1st Sess. (1953) 4

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-834

ROSALIND McCLANAHAN, on behalf of herself and all others similarly situated,

Appellant,

v.

ARIZONA STATE TAX COMMISSION,

Appellee.

BRIEF OF NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE IN SUPPORT OF APPELLANT

Native American Rights Fund files the following brief amicus curiae with the consent of Appellant Rosalind McClanahan and Appellee Arizona State Tax Commission. Written consents of both parties, by letter, are on file with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

Native American Rights Fund [hereinafter the Fund] is a private, non-profit corporation organized for the purpose of protecting the rights and enhancing the general welfare of American Indians and providing legal representation and counsel in cases of major significance. The Fund appears and submits this brief amicus curiae because of its general interest in the subject of state taxation of Indians and Indian

property in Indian Country. The Fund has several Indian tribal clients and individual Indian clients in cases which concern the validity of several forms of state taxation within the territory of self-governing Indian tribes.

Since this case will establish an important precedent regarding the power of states to tax Indians in Indian Country, and because this precedent will have effects in states other than Arizona, the Native American Rights Fund supports the powers of self-governing tribes on Indian reservations throughout the country.

ARGUMENT

It is the position of the Native American Rights Fund as amicus curiae that the State of Arizona is without power to tax the income of a Navajo Indian working and residing on the Navajo Reservation.

I

NO SPECIFIC ACT OF CONGRESS AUTHORIZES THE TAXATION OF INDIAN INCOME BY THE STATE OF ARIZONA NOR HAS ARIZONA FOLLOWED THE EXCLUSIVE STATUTORY PROCEDURE PROVIDED BY CONGRESS TO GIVE FORCE AND EFFECT TO ITS INCOME TAX LAWS WITHIN THE NAVAJO RESERVATION.

In *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832), Chief Justice Marshall set down the landmark principle which has guided this Court through the years in its protection of Native Americans and the independence of self-governing Indian tribes:

> The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, *in which the laws of Georgia can have no force,* and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in con-

formity with treaties and with the Acts of Congress. 31 U.S. at 561. [Emphasis added.]

Given *Worcester* and its progeny, the only possible source for state taxing power over a Navajo Indian residing and working on his reservation would be an Act of Congress conferring that power upon it. Congress has plenary power over Indian affairs,* and has on occasion transferred some of its power to the states.**

Congress did not grant the State of Arizona or any other state the authority to extend the application of its general laws to Indian Country until the adoption of Public Law 280, Act of August 15, 1953, 67 Stat. 588. By this Act, Congress extended to certain named states, *not including Arizona*, jurisdiction over civil causes of action and criminal offenses occurring within Indian Country in those states subject to certain exceptions. With respect to the states—such as Arizona—not specifically named in Public Law 280, Sections 6 and 7 of that Act provided procedures by which jurisdiction of causes of action in Indian Country could be assumed.*** It is undisputed that Arizona has not followed these procedures and has not acquired jurisdiction in the Navajo Nation.

In addition to granting permission for the assumption of jurisdiction, Congress also provided in Section 4 of Public Law 280, that:

> . . . those civil laws of such state that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the state . . . 67 Stat. at 589.

**Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

**Such laws as have been passed extending state power in Indian Country include 25 U.S.C. 231 (dealing with compulsory school attendance and health and sanitation regulations) and 25 U.S.C. §398c (dealing with state taxation of property on executive order reservations).

***67 Stat. at 590.

In short, Congress intended that a state complying with Public Law 280 would be permitted to apply some portion of its general substantive law in the Indian Country when it assumed civil and criminal jurisdiction. That some application of tax laws in Public Law 280 states was contemplated by Congress can be inferred from the savings provisions in the statute reaffirming the tax-exempt status of some Indian property:

> Nothing in this section shall authorize the . . . taxation of any real or personal property . . . belonging to any Indian . . . that is held in trust by the United States . . . 67 Stat. at 589.

The precise scope of the Congressional permission to apply state substantive law in Indian Country under Public Law 280 is not presented by this case, and need not be decided.* It is clear, however, that whatever taxing authority, if any, that Congress intended to confer upon a state taking affirmative action to assume jurisdiction under Public Law 280, that a state not taking such affirmative legislative action acquires no taxing power of any kind.

The legislative history of Public Law 280 clearly supports the argument of Amicus that state substantive law can be applied in Indian Country only upon compliance with Public Law 280:

> Permitting state courts to adjudicate several controversies arising on Indian reservations, and to extend to those reservations *the substantive civil laws* of the respective states insofar as those laws are of general application to private persons or private property, is deemed desirable. S. Rep. 699, H. Rep. 848 on H.R. 1063, 83rd Cong., First

---

*In *Menominee Tribe v. United States*, 391 U.S.404 (1968) this Court construed the Menominee Termination Act of 1954 *in pari materia* with Public Law 280, and concluded that treaty protected rights survived both termination of the Menominee Tribe and the application of Public Law 280 in Wisconsin.

Sess., 1953 U.S. Code Congressional & Administrative News at 2412. [Emphasis added.]

By the Act of April 11, 1968, Congress amended Public Law 280 to require tribal consent to the assumption of jurisdiction by a state.* Appellee does not contend that the Navajo Tribe has consented to the extension of the Arizona income tax by holding a special election in compliance with Section 406 of Public Law 90-284, 25 U.S.C. §1326.

At a time when Congress has substantially retracted state jurisdiction over Indian Country, and protected affected tribes from its unilateral assertion, the Arizona State Tax Commission would have this Court substantially expand state power over reservation Indians without any of the procedural protection of Public Law 280.

The decisions of this Court make it plain that it is for Congress to decide when and under what conditions a state may exercise jurisdiction and apply its laws in Indian Country. And the Court has held that procedures provided by Congress are the exclusive means by which a state may obtain such jurisdiction. *Williams v. Lee*, 358 U.S. 217 (1959), *Kennerly v. Montana District Court*, 400 U.S. 423 (1971).

For this Court to uphold the position of Arizona in this case would be to contravene the principle of *Williams* and *Kennerly* and the clearly expressed will of Congress by authorizing the state, without either its own affirmative legislative action or the consent of the affected Indians, to assume jurisdiction.** Moreover, affirming the power of the State of Arizona to tax the income of an Indian working

*Public Law 90-284, §406, 82 Stat. 79, 25 U.S.C. §1326.

**That Congress must have contemplated that no state taxing power would exist until a state assumed jurisdiction is abundantly clear from the fact that in the absence of jurisdiction, no state civil or criminal remedy would lie to enforce the payment of tax against Indians. See *Commissioner of Taxation v. Brun*, 286 Minn. 43, 174 N.W.2d 120 (1970); *Employment Security Dept. v. Cheyenne River Sioux Tribe*, 80 S.D. 79, 119 N.W.2d 285 (1963).

and residing on the Reservation would thwart the entire policy of Public Law 280 by permitting the State to tax without concurrently assuming the obligation to provide the full range of state services to Indians as a Public Law 280 state is required to do.

In *Williams, supra*, the Court said:

> In a general statute Congress did express its willingness to have any state assume jurisdiction over reservation Indians if the State Legislature or the people vote affirmatively to accept such responsibility. [citing Act of August 15, 1953 c. 505, §§6, 7, 67 Stat. 590] To date, Arizona has not accepted jurisdiction, possibly because the people of the State anticipate that the burdens accompanying such power might be considerable. 358 U.S. at 222.

II

THE RULE OF *WILLIAMS V. LEE* DOES NOT GRANT TO STATES JURISDICTION WHICH CONGRESS HAS WITHHELD.

In the face of the foregoing established principles of law, Arizona asserts the right to tax the income of Navajo Indians within the Navajo Nation. The vehicle for this assertion of state power in this Court's holding in *Williams v. Lee, supra*. The state's reliance on *Williams* is ironic for two reasons. First, this Court in *Williams* denied the state's claim of juridiction. Secondly, the language of *Williams v. Lee* itself is very clear on the subject of the vitality of *Worcester v. Georgia, supra:*

> Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in *Worcester* the broad principles of that decision came to be accepted as law. Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be

jeopardized, *but the basic policy of Worcester has remained.* 358 U.S. at 219. [Emphasis added.]

In spite of the continued vitality of the *Worcester* doctrine, Arizona seeks in the Supreme Court of the United States to accomplish what it has been unwilling to accomplish under the mechanism provided for by Congress.

The state would, in effect, stand *Williams* on its head. In *Williams,* the Court denied the state claim of jurisdiction because it would infringe "on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. The State now asserts taxing jurisdiction, despite its failure to follow Public Law 280 procedures, because state taxation does not infringe tribal self-government. In so doing, it would convert *Williams* from a shield for tribal self-government into a sword for expansion of state jurisdiction.

Williams was never intended to be so used. It does not mandate a case-by-case determination, on an ad hoc basis, of whether this or that state law "infringes" tribal sovereignty. Such a rule would be productive of undue litigation, and subject the states, Indians and persons dealing with them to pronounced uncertainties.

Rather, *Williams* requires that (1) where the state has not followed Public Law 280 procedures, and (2) there is a functioning tribal government, then *Worcester* bars the application of state law to Indians.

None of the cases used by the Court in formulating the *Williams* "infringement" test dealt with the application of state law to reservation Indians. Exercises of state power which were acknowledged by the Court to be "non-infringing" include suits by Indians against outsiders in state court,* state criminal prosecutions of one non-Indian for

Williams, supra, at 219, 220 citing *Felix v. Patrick,* 145 U.S. 317 (1892), *United States v. Candaleria,* 271 U.S. 432 (1926).

the murder of another in Indian Country,* and territorial taxation of non-Indian owned railroad property located on reservations.**

Arizona relies heavily upon this Court's opinion in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). Amicus insists that the reliance is misplaced. It was held in that case that Alaska could regulate trap fishing because no reservation existed from which the right to fish might be implied. A contrary result would have been reached had such a reservation existed. Compare *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962).

The present case is entirely distinguishable. The Navajo Nation is a self-governing tribe controlling a large territory which includes parts of three states. The tribe's right to govern the Indians' internal affairs is secured by treaty. *Williams, supra*, 358 U.S. at 321, 322. Moreover, while Arizona has acquired no jurisdiction in Indian Country, Congress has explicitly granted Alaska jurisdiction. 72 Stat. 545, 18 U.S.C. §1162, 28 U.S.C. §1360.

In spite of the non-reservation context, the Court in *Kake*, after discussing several cases involving application of state law to *non-Indians* on reservations,*** concludes:

> These decisions indicate that even on reservations state laws may be applied *to Indians* unless such

---

New York ex rel Ray v. Martin, 326 U.S. 496 (1946); See also, *United States v. McBratney*, 104 U.S. 621 (1882); *Draper v. United States*, 164 U.S. 240 (1896); *Donnelly v. United States*, 228 U.S. 243 (1913).

***Utah & Northern Railway Co. v. Fisher*, 116 U.S. 28 (1885); *Accord, Maricopa and Phoenix R. Co. v. Territory of Arizona*, 156 U.S. 347 (1895).

***In addition to citing *William v. Lee*, the Court relies upon *Thomas v. Gay*, 169 U.S. 264 (1898) (sustaining an Oklahoma territorial law taxing as personal property the cattle of non-Indians on an Indian reservation) and *Langford v. Monteith*, 102 U.S. 145 (1880) (A non-Indian may sue another non-Indian in state court to obtain possession of buildings located on a reservation). *Fisher, Maricopa, and Martin* discussed *supra* also involved no application of state law or jurisdiction affecting Indians.

> application would interfere with reservation self-government or impair a right granted or reserved by federal law. 369 U.S. at 75. [Emphasis added.]

Amicus contends that such a conclusion was an unwarranted extension of the case law.

The Arizona court also bases its holding upon *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936) and *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). The application of state law to Oklahoma Indians is a non-infringing exercise of state power because of the peculiar status of Oklahoma tribes and can have no relevancy in the instant case. As this Court acknowledged in *Oklahoma Tax Commission:*

> The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the former tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester v. Georgia, supra*, and, unlike the Indians involved in *The Kansas Indians* case, supra, they are actually citizens of the State, with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions. 319 U.S. at 603.

Tribal governments in Oklahoma were substantially abolished just prior to statehood. See, e.g., Act of June 28, 1898, 30 Stat. 495. In sharp contrast to this situation, the Navajo Tribe has not relinquished any of its powers of self-government. It maintains its own courts and police force, its schools are models for federal Indian education, and its reservation program is the largest in the nation.

Characteristic of the Arizona court's rush to a judgment of taxability of Navajo income is its cursory treatment of the reasoning in *Commissioner of Taxation v. Brun*, 286 Minn. 43, 174 N.W. 2d 120 (1970). That case rejected the attempted state taxation of the income of reservation Red Lake

Chippewas,* in a case entirely analogous to that of the Navajos here. The Minnesota court concluded that Minnesota's income tax infringed upon tribal self-government under the *Williams* rule. The Minnesota court correctly distinguishes the situation of the Oklahoma tribes and Alaska communities which Arizona's court uses so advantageously and incorrectly. Amicus respectfully submits that the Minnesota case reaches the correct result. While its analysis does not draw on the teaching of *Kennerly, supra,* that a state must act affirmatively to apply its laws to Indians, its conclusion is entirely consistent with *Kennerly*.

In summary, Amicus submits that the correct interpretation of the rule in *Williams v. Lee* requires that the *Worcester* rule prevails except where (1) a state has accepted Public Law 280 jurisdiction over Indian Country; or (2) the asserted jurisdiction involves non-Indians in Indian Country, or (3) the matter arises on Indian land where there is no established tribal government.

*The Red Lake Band of Chippewas was explicitly excluded by Congress from the grant of jurisdiction to Minnesota in Public Law 280, 67 Stat. 588.

CONCLUSION

Amicus urges that this Court reverse the judgment of the Court of Appeals of Arizona since Congress has not explicitly permitted Arizona to apply its income tax on the Navajo Reservation, and since Arizona has not availed itself of the Congressional consent to apply its laws in Indian Country. Amicus respectfully requests that this Court refuse to give by judicial fiat, taxing power which the State of Arizona has not been granted by Congress. In this way, this Court can maintain its systematic guardianship of the authority of Indian governments over their reservations.

Respectfully submitted,

DAVID H. GETCHES
JOHN E. ECHOHAWK
THOMAS L. SMITHSON
1506 Broadway
Boulder, Colorado 80302

Counsel for Amicus Curiae
Native American Rights Fund

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Interest of the United States	2
Statement	2
Summary of argument	3
Argument:	
I. Decisions of this Court establish that with narrow exceptions state laws including state tax laws may not be applied within an Indian reservation, except as specifically authorized by Congress	5
II. Congress has consistently acted on the assumption that in the absence of its express authorization, the States have no power to regulate or tax Indians on a reservation	13
III. The history of the Navajos, the United States, and Arizona concerning this reservation is inconsistent with Arizona's asserted right of taxation	16
Conclusion	19

CITATIONS

Cases:

Connecticut General Life Ins. Co. v. *Johnson*, 303 U.S. 77	13
Draper v. *United States*, 164 U.S. 240	6

Cases—Continued

	Page
Ghahate v. *Bureau of Revenue*, 80 N.M. 98, 451 P. 2d 1002	17
Kake Village v. *Egan*, 369 U.S. 60	10, 12
Kansas Indians, The, 5 Wall. 737	7, 11
Kennerly v. *District Court of Montana*, 400 U.S. 423	13, 14
Maricopa & Phoenix R. Co. v. *Arizona Territory*, 156 U.S. 347	7
Metlakatla Indians v. *Egan*, 369 U.S. 45	10
New York Indians, The, 5 Wall. 761	7
Shaffer v. *Carter*, 252 U.S. 37	13
Surplus Trading Co. v. *Cook*, 281 U.S. 647	8
Thomas v. *Gay*, 169 U.S. 264	7
Utah & Northern Railway v. *Fisher*, 116 U.S. 28	6, 7
United States v. *McBratney*, 104 U.S. 621	6
Warren Trading Post v. *Arizona Tax Commission*, 380 U.S. 685	11, 12, 15, 17
Williams v. *Lee*, 358 U.S. 217	8, 10, 12, 13, 15, 16
Worcester v. *Georgia*, 6 Pet. 515	5, 6, 9, 11
Your Food Stores, Inc. v. *Village of Espanola*, 68 N.M. 327, 361 P. 2d 950	17

Constitutions, treaty and statutes

Treaty of June 1, 1868, 15 Stat. 667	16
Act of April 11, 1968, 82 Stat. 78, 25 U.S.C. 1321, *et seq.*	14
Arizona Enabling Act, Sec. 20, 36 Stat. 569	17

Constitutions, treaty and statutes—Continued	Page
Navajo-Hopi Rehabilitation Act, 64 Stat. 44, 25 U.S.C. 631, *et seq.*	17, 18
New Mexico Enabling Act, Sec. 2, Part 2, 36 Stat. 558-559	17
Public Law 280, Act of August 15, 1953, 67 Stat. 588	14, 15
72 Stat. 619, amended by 78 Stat. 390	14
4 U.S.C. 105-109	15
4 U.S.C. 106	15
4 U.S.C. 108	15
4 U.S.C. 109	15
18 U.S.C. 1162	14
25 U.S.C. 398	15
25 U.S.C. 564-564x	13
25 U.S.C. 639	18
25 U.S.C. 677-677aa	13
25 U.S.C. 691-708	14
25 U.S.C. 721-728	14
25 U.S.C. 741-760	14
25 U.S.C. 791-807	14
25 U.S.C. 821-826	14
25 U.S.C. 841-853	14
25 U.S.C. 891-902	14
25 U.S.C. 971-980	14
28 U.S.C. 1360	14
Utah Enabling Act, Sec. 3, part 2, 28 Stat. 108	17
Arizona Constitution, Art. 20, para. 4	17
New Mexico Constitution of 1911, Art. 21, Sec. 2	17
Constitution of Utah, Art. III, Sec. 2	17
Laws of 1967, Ch. 2, Sec. 10, 36 Ariz. R.S. § 1801	15

Constitutions, treaty and statutes—Continued Page

Laws of 1967, Ch. 106, Sec. 36 Ariz. R.S. § 1865 15

Miscellaneous:

H. Rep. No. 147, 81st Cong. 2d Sess..... 17

U. S. Department of the Interior, *Federal Indian Law* (Cohen, 1956 rev.) 5, 8

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-834

ROSALIND McCLANAHAN, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLANT

v.

ARIZONA STATE TAX COMMISSION

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The order of the Supreme Court of Arizona denying review (J.S. App. A) is not reported. The opinion of the Arizona Court of Appeals (J.S. App. B) is reported at 14 Ariz. App. 452, 484 P. 2d 221. The opinion of the Arizona Superior Court (J.S. App. C) is unreported.

JURISDICTION

The Supreme Court of Arizona entered final judgment denying review on September 21, 1971 (J.S. App. 1a). Notice of appeal was filed on October 4, 1971 (J.S. 6). On May 15, 1972, this Court noted probable jurisdiction. This Court's jurisdiction rests on 28 U.S.C. 1257(2).

QUESTION PRESENTED

Whether the State of Arizona has jurisdiction to tax the income of Navajo Indians who reside on the Navajo Reservation and whose income is earned on the Reservation.

INTEREST OF THE UNITED STATES

By order of February 22, 1972, the Court invited the Solicitor General to express the views of the United States in this case. Because of its treaty obligations to Indian Tribes and its fiduciary relationship to reservation Indians, and in light of the extensive federal legislation relating to Indian taxation, providing funds for Indian economic development, and fostering tribal self-government, the United States is concerned about extensions of state taxation to Indians on reservations without congressional consent.

STATEMENT

Rosalind McClanahan is an enrolled member of the Navajo Tribe of Indians. At all pertinent times she resided within the portion of the Navajo Indian Res-

ervation located in the State of Arizona. Her income was "derived from sources within the confines of the Navajo Indian reservation" (J.S. App. B, pp. 2a-3a). Her employer withheld a portion of her income which was turned over to the State of Arizona under its income tax laws.

Appellant filed an Arizona state individual tax return and a written protest claiming a right to a refund of the entire sum withheld from her wages on the ground that Arizona had no right to tax her income. After an unsuccessful administrative appeal, she brought this class action in Apache County, Arizona, on behalf of herself and all others similarly situated seeking a refund of the taxes withheld by her employer (J.S., pp. 4-5; App. B, pp. 2a-3a). The County Court dismissed the action (J.S. App. B, p. 3a). On appeal, the Court of Appeals of the State of Arizona affirmed the judgment of the trial court in a written opinion (J.S. App. B). The appellate court held that state personal income taxation of Indians on reservations is permissible because it does not adversely affect tribal interests or impair tribal self-government. The Supreme Court of Arizona denied appellant's subsequent petition for review (J.S. App. A). Appellant then appealed to this Court, which noted probable jurisdiction on May 15, 1972.

SUMMARY OF ARGUMENT

The federal government's exercise of its constitutional powers with respect to Indians has resulted in substantial federal pre-emption of the regulation of

Indian affairs. This Court has consistently held that with narrow exceptions applicable primarily to non-Indians, state laws including state tax laws can have no effect within an Indian Reservation in the absence of specific authorization by Congress.

Congress has consistently acted on the assumption that in the absence of its express authorization the States have no power to regulate or tax Indians on a reservation. When Congress has determined that a State should have more extensive jurisdiction over a particular reservation within its boundaries it has passed specific legislation to this effect. Congress has never granted jurisdiction to the State of Arizona over the Navajo Reservation. Moreover, when Arizona, under general legislation, had the opportunity to assume broad jurisdiction over the reservation it did not choose to do so.

Similarly, when Congress has wished to enable the States to tax within Indian reservations, it has expressed this intent through specific legislation. For example, Congress has permitted the taxation of mineral production on unallotted tribal lands, but with particular safeguards. And when Congress permitted the States to impose income taxes on persons residing in federal areas, it specifically exempted Indians.

It is particularly clear that the Indians on the Navajo Reservation are not subject to taxation by Arizona. The Navajo Reservation was established before Arizona was admitted to the Union. When that State was admitted, it was under the express condition that it disclaim all right and title to Indian lands includ-

ing the Navajo Reservation and that such lands would remain under the control and jurisdiction of the Congress of the United States. Congress has consistently exercised control over the Navajo reservation, has spent large sums of money on the reservation and has subsidized the State of Arizona with the understanding that Arizona does not have jurisdiction to tax Indians residing on the reservation. Congress' action in this respect has been consistent, deliberate and equitable, and leaves no room for state taxation without congressional consent.

ARGUMENT

I

Decisions Of This Court Establish That With Narrow Exceptions State Laws Including State Tax Laws May Not Be Applied Within An Indian Reservation, Except As Specifically Authorized By Congress

The federal government's exercise of its constitutional powers with respect to Indians—including the treaty power, the war power, dominion over public lands, and the power to regulate commerce with the Indians[1]—has resulted in substantial federal preemption of the regulation of Indian affairs. In 1832 in *Worcester* v. *Georgia*, 6 Pet. 515, this Court held broadly that the laws of Georgia could have no force within the Cherokee Reservation located in that State. Speaking through Chief Justice Marshall, the Court

[1] For a discussion of these powers in the context of Indian law, see generally U.S. Department of the Interior, *Federal Indian Law* (Cohen, 1956 rev.) pp. 21-47.

stated that "[t]he whole intercourse between the United States and [the Cherokee] nation, is, by our constitution and laws, vested in the government of the United States" (*id.* at 561), and described the Tribe as "a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force * * *" (*ibid.*). The principle of *Worcester* remains today a basic underpinning of Indian self-government and an important premise for federal programs designed to strengthen tribal government and to foster economic development within Indian reservations.

Decisions subsequent to *Worcester* have established that the States may exercise jurisdiction over certain exclusively non-Indian activities occurring on a reservation. *United States* v. *McBratney*, 104 U.S. 621 (service of process on non-Indian living within reservation); *Draper* v. *United States*, 164 U.S. 240 (murder on reservation of one non-Indian by another non-Indian); *Utah & Northern Railway* v. *Fisher*, 116 U.S. 28 (state taxation of portion of railroad running through reservation on land ceded to the railroad). But these are narrow exceptions to *Worcester* concerning matters not directly affecting the Indians who reside on the reservation. No decision of this Court authorizes state regulation or taxation of Indians on reservations, in the absence of congressional authorization.

Indeed, reasoning similar to that of *Worcester* was applied to state taxation by this Court some thirty years later in striking down an attempt by the State of Kansas to tax reservation lands held in severalty

by individual Indians. *The Kansas Indians*, 5 Wall. 737. See also *The New York Indians*, 5 Wall. 761. In so holding the Court emphasized the disclaimer of jurisdiction by Kansas when it entered the Union (5 Wall. 756-757) and the Tribe's maintenance of its customs, laws and tribal organization (*ibid.*).[2] The Court refused to separate, for purposes of state taxation, the interests of individual Indians from those of the Tribe. As with state jurisdiction in general, narrow exceptions have been developed which in certain circumstances permit state taxation within Indian reservations, but only of interests of non-Indians. *Thomas* v. *Gay*, 169 U.S. 264 (upholding an Oklahoma territorial tax on the cattle of non-Indian lessees of reservation land); see also *Maricopa & Phoenix Railroad* v. *Arizona Territory*, 156 U.S. 347; *Utah & Northern Railway* v. *Fisher*, 116 U.S. 28.

It has, in sum, long been hornbook law that in the absence of specific authorization by Congress state regulation or taxation of Indians on reservations is not permitted:

> * * * State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian Reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress. Conversely Indian property outside of

[2] Although Indians are now citizens of the United States and thus of the States in which they live, the reasoning of the Court in *Kansas Indians* remains fully applicable to reservation Indians who maintain their tribal structure and continue under un-terminated federal supervision.

> an Indian reservation is subject to State taxation unless congressional authority for a claim of tax exemption can be found.* * * [citing *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 651].*

The Court of Appeals of Arizona in the present case has attempted to broaden greatly the applicability of state law within the Navajo Reservation by interpreting language in *Williams* v. *Lee*, 358 U.S. 217, and subsequent cases as authorizing the application of state law directly to reservation Indians, so long as tribal government is not destroyed. The Arizona court thus held that the State may impose its income tax on reservation Indians without their consent or the consent of Congress. J.S. App. 4a-10a. We submit that this is a misinterpretation of this Court's decisions—a misinterpretation that would deprive the tribes of a substantial part of the independence that federal treaty obligations, law and policy have enabled them to preserve.

Indeed, *Williams* and subsequent decisions of this Court have reaffirmed that in the absence of congressional authorization, state laws generally may not be applied to reservation Indians. And, specifically, there is nothing in this Court's decisions that permits the application of state tax laws to reservation Indians without express congressional authorization.

In *Williams*, this Court, reversing the Supreme Court of Arizona, held that Arizona courts have no jurisdiction to hear suits by non-Indians against Indians who live on the Navajo Reservation, and that

---

*U.S. Department of the Interior, *Federal Indian Law* (Cohen, 1956 rev.) 845-846.

such suits can be brought only in tribal courts. In an opinion which reviewed in detail the law concerning state jurisdiction over Indian reservations, the Court quoted with approval from *Worcester* and stated that the only exceptions to the *Worcester* principle of the inapplicability of state law to reservation Indians have been "in cases where essential tribal relations were not involved *and where the rights of Indians would not be jeopardized* * * *." 358 U.S. at 219 (emphasis added). The Court gave as examples of these exceptions the jurisdiction of state courts to hear suits by Indians against non-Indians and the jurisdiction of state courts to try non-Indians for crimes committed on reservations against other non-Indians. *Id.* at 219-220. In describing these exceptions and their limitations, the Court stated, "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. The Court pointed out that "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Id.* at 220. It noted, finally, that "No departure from the policies which have been applied to other Indians is apparent in the relationship between the United States and the Navajos." *Id.* at 221. Indeed, the Court held, "Congress recognized * * * authority in the Navajos [to govern their reservation] in the Treaty of 1868, and has done so ever since." *Id.* at 223.

Kake Village v. *Egan*, 369 U.S. 60, did not modify the general principle that state law is inapplicable to Indians on reservations. In *Kake* two communities of Alaskan Indians who had never been provided with a reservation claimed that by their status as Indians and under the legislation admitting Alaska into the Union they were free to operate fish traps contrary to Alaska law. They relied upon language in the Alaska Statehood Act providing among other things that the United States retains "absolute jurisdiction and control" over Indian property. *Id.* at 67. The Court pointed out that despite the language in the Statehood Act the State of Alaska had been granted civil and criminal jurisdiction over all Indian country in the State by an Act of Congress in 1958, 72 Stat. 545. The Court also relied heavily on the legislative history of the Alaska Statehood Act, 369 U.S. at 67-69.

While this Court's opinion in *Kake* emphasizes congressional Acts and judicial decisions permitting certain state regulatory activities within Indian reservations, the decisions of this Court cited as examples of state law applying on Indian reservations over which the states have not been granted general criminal and civil jurisdiction are only those which we cite on page 6 *supra*, none of which directly affect Indians living on the reservation. Moreover, *Kake* cites *Williams* with approval (*id.* at 74), and does not purport to modify it. And, significantly, in a companion case, *Metlakatla Indians* v. *Egan*, 369 U.S. 45, where the Indians lived on a reservation

established by Congress, the Court upheld the Secretary of the Interior's exclusive jurisdiction (other than tribal and, of course, congressional jurisdiction) over fishing within the reservation.

Finally, in *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, decided three years after *Kake* and *Metlakatla*, this Court in effect reaffirmed the continuing vitality of the *Worcester-Kansas Indians* principle in striking down an attempt by the State of Arizona to impose a tax of 2 percent on the gross proceeds of sales of a retail business owned by non-Indians and located on the Navajo Reservation. The main emphasis of the opinion was on the extensive history of federal regulation of trade with the Indians. *Id.* at 688-690. But this was not the sole rationale of the decision. The Court also relied on the federal government's long standing policy of "permitting the Indians largely to govern themselves, free from state interference," *id.* at 686-687, see also 690-691, and articulated the restricted range for exceptions to the rule as consisting only of "laws * * * specifically authorized by acts of Congress, or where they clearly do not interfere with federal policies concerning the reservations." *Id.* at 687 n. 3.

In light of this legal background, we submit that the attempt of the Arizona Court of Appeals in the present case to separate, for purposes of state taxation, the interests of reservation Indians as individuals from the interests of the tribe itself (J.S. App. 6a)—directly contrary to this Court's *Kansas Indians* decision, *supra*—was unwarranted. And, to the

extent that the decision below is based on interpretation out of context of particular language in *Williams*, *Kake* and *Warren Trading Post* to justify state taxation of Indians on a reservation (see J.S. App. 5a, 7a-8a), the Arizona court has misconstrued these cases. The rule has been and should remain that state law applies within a reservation only where clearly authorized by Congress or in limited situations where the effect of applying the laws within a reservation is on non-Indians alone. This Court has appropriately implemented federal law and policy in this area by requiring a State which seeks broader jurisdiction over reservations within its borders to bear the burden of convincing Congress, which has legislated extensively in this area, that such jurisdiction is warranted.

Moreover, as this Court pointed out in *Williams*, 358 U.S. at 222-223, Arizona did not choose to assume civil and criminal jurisdiction over the Navajo reservation when Congress offered it the opportunity to do so (see pp. 14-15 *infra*). While the presence of civil and criminal jurisdiction over a reservation is not synonymous with a power to tax (see our memorandum in *Tonasket* v. *The State of Washington*, No. 71-1031, probable jurisdiction noted, June 12, 1972,) without such jurisdiction, taxation, other than in most limited circumstances, is extremely awkward.

> Governmental jurisdiction in matters of taxation, as in the exercise of the judicial function, depends upon the power to enforce the mandate of the State by action taken within its borders,

> either *in personam* or *in rem* according to the circumstances of the case, as by arrest of the person, seizure of goods or lands, garnishment of credits, sequestration of rents and profits, forfeiture of franchise or the like * * *.

Shaffer v. *Carter*, 252 U.S. 37, 49, 50, 52. See also *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 80-81. Without general jurisdiction, State taxation should be permitted only where Congress has acted, thus giving Congress the opportunity of weighing alternative sources of state revenue (see pp. 17-18) and of designing its legislation so as to minimize procedural difficulties.

II

Congress Has Consistently Acted On The Assumption That In The Absence Of Its Express Authorization, The States Have No Power To Regulate Or Tax Indians On A Reservation

As this Court pointed out in *Williams*, "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." 358 U.S. at 220. When Congress has wished to permit the States to exercise jurisdiction within Indian reservations, it has done so by particular statutes. See *Kennerly* v. *District Court of Montana*, 400 U.S. 423. For example, Congress granted certain States plenary jurisdiction over specified tribes by "termination" legislation enacted in the 1950's,[4] but did not terminate its guardian-

[4] Klamath Tribe, 25 U.S.C. 564-564x; "mixed blood" Ute Indians, 25 U.S.C. 677-677aa; "Western Oregon" Indians, 25

ship over the Navajo Tribe. And Congress, through Public Law 280, Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. 1162 and 28 U.S.C. 1360 specifically delegated to some States (but not Arizona, New Mexico or Utah—the States in which the Navajo Reservation lies) civil and criminal jurisdiction over Indian reservations within their borders. Public Law 280 also initially provided a method by which any State which took specific steps to do so could bring reservation Indians within the jurisdiction of its criminal and civil courts without the consent of the tribes affected. In the Indian Civil Rights Act of 1968, however, Congress, responding to strong objections to the involuntary features of Public Law 280, amended it in the interest of Indian self-government, to require the carefully expressed consent of the enrolled Indians living within a reservation before a State can assume jurisdiction within the reservation, and to permit retrocession of state jurisdiction acquired under the earlier law. Act of April 11, 1968, Title IV, 82 Stat. 78, 25 U.S.C. 1321, *et seq.* See *Kennerly* v. *District Court of Montana*, *supra*. During the interval between the passage of P.L. 280 and its amendment, neither Arizona, New Mexico, nor Utah chose to assume general civil and

---

U.S.C. 691-708; Alabama and Coushatta Indians of Texas, 25 U.S.C. 721-728; Paiute Indians of Utah, 25 U.S.C. 741-760; Wyandotte Tribe of Oklahoma, 25 U.S.C. 791-807; Peoria Tribe of Oklahoma, 25 U.S.C. 821-826; Ottawa Tribe of Oklahoma, 25 U.S.C. 841-853; Menominee Tribe of Wisconsin, 25 U.S.C. 891-902; Ponca Tribe of Nebraska, 25 U.S.C. 971-980; California rancherias, 72 Stat. 619, amended by 78 Stat. 390.

criminal jurisdiction over the Navajo Reservation. See *Williams* v. *Lee*, 358 U.S. 217, 222-223.[5]

In taxation, as in other matters, when Congress has wished to confer on the States jurisdiction over reservation Indians, it has done so by carefully delimited legislation. Thus 25 U.S.C. 398 specifically authorizes the States to tax mineral production on unallotted tribal land, but also provides that the tax shall not become a lien or charge of any kind against the land or the property of the Indian owner. And 4 U.S.C. 105-109 (the Buck Act), which among other things permits the States to impose income taxes on persons "residing within a Federal area or receiving income from transactions occurring or services performed in such area" (4 U.S.C. 105, 106), specifically exempts "Indians not otherwise taxed" from the operation of the Act (4 U.S.C. 109), and contains other safeguards of federal jurisdiction (4 U.S.C. 108). See also *Warren Trading Post*, *supra*, 380 U.S. at 691.

---

[5] Arizona did, during this interval, enact two statutes asserting jurisdiction over "Indian tribal lands, reservations and allotments" for the enforcement of air and water pollution legislation. Laws of 1967, Ch. 2, Sec. 10, 36 Ariz. R.S. (Cum. Supp.) § 1801; Laws of 1967, Ch. 106, Sec. 2, 36 Ariz. R.S. (Cum. Supp.) § 1865. These statutes are far less than a full assumption of civil and criminal jurisdiction under P.L. 280. Moreover, such partial assumptions are of doubtful validity under the 1953 Act. In other particular contexts, such as health, education and liquor control, Congress has authorized application of state law on Indian reservations under specified conditions (see *Warren Trading Post*, *supra*, 380 U.S. at 687 n. 3).

Congress has passed no law which directly or by implication authorizes state taxation of income earned by Indians within the Navajo Reservation.

III

The History Of The Navajos, The United States, And Arizona Concerning This Reservation Is Inconsistent With Arizona's Asserted Right Of Taxation

The Navajo Indian Reservation was established by a treaty concluded between the United States and the Navajo Tribe on June 1, 1868 (15 Stat. 667). The Reservation included lands in the present States of Arizona, New Mexico and Utah. The treaty established peace between the United States and the Navajos and took from the Navajos most of what had been their native country, but reserved for them a part of their former lands as "their permanent home". The treaty also provided that no one except United States Government personnel and persons authorized by the Indians could enter the reservation. *Id.* at 668, Art. II. See *Williams* v. *Lee*, *supra*, 358 U.S. at 220-223 (quoted in part at p. 9, *supra*).

More than 40 years after the establishment of the Navajo Reservation, Arizona was admitted to the Union under the express condition that the people inhabiting the proposed State:

> forever disclaim all right and title to * * * all lands * * * owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall

have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States. * * *

36 Stat. 569. The Arizona Constitution contains substantially identical language (Art. 20, para. 4), as do the enabling acts and Constitutions of New Mexico and Utah where other parts of the reservation are located.[6]

The United States has acted consistently on the assumption that Arizona has no jurisdiction over Indians within this reservation. Indeed, in 1949, President Truman vetoed a precursor of the Navajo-Hopi Rehabilitation Act which would have extended to the States in which the reservation is located concurrent jurisdiction over the reservation.[7] The President's veto message noted that the bill's "only objectional provisions are those * * * which, with some qualifications, extend State civil and criminal laws and court jurisdiction to the Navajo-Hopi Reservations which are now under federal and tribal laws and courts." H. Rep. No. 1474, 81st Cong., 2d Sess., p. 6. This

[6] New Mexico Enabling Act, Sec. 2, Part 2, 36 Stat. 558-559; New Mexico Constitution of 1911, Article 21, Section 2; Utah Enabling Act, Sec. 3, part 2, 28 Stat. 108; Constitution of Utah, Art. III, Sec. 2. The Supreme Court of New Mexico in a comprehensive opinion denied the jurisdiction of New Mexico to tax within a reservation. See *Your Food Stores, Inc.* v. *Village of Espanola*, 68 N.M. 327, 361 P. 2d 950. This case was cited with approval in *Warren Trading Post*, *supra*, 380 U.S. at 691 n. 18. But see *Ghahate* v. *Bureau of Revenue*, 80 N.M. 98, 451 P. 2d 1002.

[7] The Hopi Reservation is located within the confines of the Navajo Reservation.

provision, which at least arguably could have provided the basis for state taxation within the Navajo Reservation, was eliminated from the Navajo-Hopi Rehabilitation Act enacted in 1950, 64 Stat. 44, 25 U.S.C. 631 *et seq.* In the Rehabilitation Act as passed in 1950, Congress added a major subsidy to the States of Arizona, New Mexico and Utah to defray 80 percent of the States' ordinary share of Social Security payments to Indians living on the Navajo Reservation, 25 U.S.C. 639. Congress also authorized the expenditure of more than $88,000,000 for a major rehabilitation program for the Navajos and Hopis living on the reservation. 64 Stat. 45. Under the Rehabilitation Act and subsequent authorizations and appropriations, the Bureau of Indian Affairs alone (thus excluding expenditures for Indian health services and other federal services provided to the general public) has made the following expenditures on the Navajo Reservation in selected typical years:[8]

1950	$10,280,000
1955	19,275,000
1960	32,220,000
1965	47,657,000
1970	63,236,000
1971	87,144,000

We do not argue that tax jurisdiction depends upon relative expenditures. As to state jurisdiction within Indian reservations, it depends upon congressional

[8] The figures were supplied to us by the Bureau of Indian Affairs.

authorization. We mention these expenditures and this legislative history, however, to show that the conclusion that Arizona is not permitted to tax Indians within the Navajo Reservation (except as to mineral production) is supported by a consistent, deliberate, and equitable pattern of congressional conduct, as well as by the decisions of this Court previously discussed.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Arizona should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

LAWRENCE G. WALLACE,
Deputy Solicitor General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

EDMUND B. CLARK,
CARL STRASS,
Attorneys.

JULY 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 471423 14

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
ARGUMENT	3
CONCLUSION	3
APPENDIX	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-834

ROSALIND MCCLANAHAN,
Appellant,

v.

ARIZONA STATE TAX COMMISSION,
Appellee.

On Appeal from the Supreme Court of Arizona

BRIEF FOR AMICUS CURIAE, ESTATE OF ROSE MASON, DECEASED, IN SUPPORT OF APPELLANT

STATEMENT OF INTEREST

This brief is filed with the consent of both parties.

Rose Mason, deceased, was a restricted Osage Indian living on the Osage Reservation in Oklahoma, who died owning various properties held in trust for her by the United States. The State of Oklahoma imposed a tax on her estate, and the United States, as her trustee,

voluntarily paid the tax out of her estate (it now concedes, we believe, that the tax does not lie). Her successors brought suit in the Court of Claims to require the United States to repay the estate. The Court of Claims allowed judgment, and allowed the United States a right over against Oklahoma. *Mason* v. *United States*, —— F.2d —— (Ct. Cl. Docket No. 417-70, decided June 16, 1972).

The Court of Claims' opinion was based on its finding that this Court's opinion in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), had overruled *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948), by implication. It is possible that either the United States or Oklahoma will seek review in this Court from that decision dated June 16, 1972. It is also possible that the *West* case will be discussed by this Court in disposing of the instant case. Therefore, because of the latter possibility, the successors of Rose Mason as amici curiae wish respectfully to call the Court's attention to their hope that the *West* case will not be inadvertently revived or extended, or at least that judgment on its current viability be deferred until the *Mason* case reaches this Court for full briefing and argument.

The reason we think this Court might discuss the *West* case is that it allowed (1) a state tax to be imposed on (2) the restricted trust property (3) of a restricted Indian (4) residing on a tribally-governed reservation (5) wherein the state did not have general jurisdiction under Public Law 280 or otherwise. Elements (1), (4) and (5), and probably (3), are present in the instant case. Consequently, the *West* case would seem to offer some support for the proposition that Arizona may impose its income tax in the instant case, that is, if one were not aware of the impact of the *Capoeman* case on the *West* case, and of the decisions of lower courts in cases since the *Capoeman* case.

ARGUMENT

In lieu of argument that the *West* case is no longer good law, we present in the Appendix hereto the applicable portion of the Court of Claims' opinion in the *Mason* case. That portion is quoted verbatim from the Court of Claims slip opinion of June 16, 1972, pages 15-21. The opinion was by Judge Davis, and was concurred in by Chief Judge Cowan and Judges Durfee, Nichols and Kunzig. Judge Skelton dissented.

CONCLUSION

For the reasons set forth in the *Mason* opinion quoted in the Appendix, the *West* case is under a grave cloud, to say the least, and should not be relied on as good law, at least until after the full briefing and argument which will occur in the *Mason* case if review in this Court is sought and granted.

Respectfully submitted,

CHARLES A. HOBBS
Counsel for the Estate of Rose Mason, Deceased
1616 H Street, N.W.
Washington, D. C.

WILKINSON, CRAGUN & BARKER
PIERRE J. LAFORCE
Washington, D. C.

FILES, MAHAN & WILSON
R. DON MAHAN
Pawhuska, Oklahoma
Of Counsel

July 21, 1972

APPENDIX

[Part VI of Court of Claims Opinion in *Mason* v. *United States*, decided June 16, 1972]

VI

"The current standing of West v. Oklahoma Tax Commission

"Appraisal of the applicability of the tax necessarily thrusts us into an inquiry on the current status of *West v. Oklahoma Tax Comm'n, supra*, 334 U.S. 717 (1948). For an inferior tribunal this is a most delicate undertaking. It goes without saying that we cannot refuse or fail to follow a Supreme Court decision, directly in point, because we disagree with its reasoning or think it erroneous. See, *e.g., McCorkle* v. *The First Pennsylvania Banking & Trust Co.*, C.A. 4, decided April 20, 1972 (Sobeloff J.), 40 LW 2725. But our responsibility differs where there have been significant developments—in the Supreme Court itself, in the lower courts, and in relevant administrative practice—showing that the underpinnings of the highest court's decision have been seriously weakened or eroded. If that is so, a lower court can properly, without disrespect or flouting authority, make the judgment, in due care and circumspection, that the Court will no longer follow its earlier holding. *See, e.g., Barnette* v. *West Virginia State Board of Ed.*, 47 F. Supp. 251, 252-53 (S.D. W. Va. 1942) (Parker J.), *aff'd*, 319 U.S. 624 (1943); *United States* v. *Girouard*, 149 F.2d 760, 765-67 (C.A. 1, 1945) (Woodbury J., dissenting), *rev'd*, 328 U.S. 61 (1946); *Andrews* v. *Louisville & Nashville R.R.*, 441 F. 2d 1222 (C.A. 5, 1971), *aff'd*, U.S. Sup. Ct., No. 71-300, decided May 15, 1972, 40 LW 4511.

The history in Part IV, *supra*, shows, in our view, that there has been just such a significant development with respect to *West*—beginning with *Squire* v. *Capoeman*, 351 U.S. 1, in 1956. There has been a marked change in the evaluation of the reasons given by the Court for its result in *West* (and the precursor, *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598 (1943)), and there has also been a considerable increase in the kinds of taxes with respect to which restricted Indian property has been held immune. In several crucial aspects the essential bases of *West* have been so weakened that, in our opinion, the decision no longer stands as authoritative.

A. Following the lead of *Oklahoma Tax Comm'n* v. *United States*, *supra*, the *West* opinion put aside as immaterial the facts that, if the tax was leviable, Oklahoma could impose a lien on the property (334 U.S. at 725) and the estate could be much depleted through successive payments of state death taxes before the end of the trust period (334 U.S. at 725-26, 727). *Squire* took the opposite positions that (1) provision in an allotment statute that the property was to be transferred, at trust end, free of all charge or incumbrance "might well be sufficient" to bar taxation (351 U.S. at 6-7), and (2) it is necessary to preserve the property wholly intact for the Indian—including immunity from taxation—so that he can "go forward when declared competent with the necessary chance of economic survival in competition with others" (351 U.S. at 10).

Again, *West* demanded affirmative indications by Congress "that these burdens require that the transfer be immune" from tax liability (334 U.S. at 727). See also *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. at 604, 606, 607, 609. *Squire*, reversing the presumption, considered these burdens so important that Congress should affirmatively authorize taxibility if the desire was to permit it.

Thus, both of the main foundations for *West* (and *Oklahoma Tax Commission*) were disavowed in *Squire* v. *Capoeman*. It is this latter approach which has been uniformly applied in the subsequent lower court cases and administrative rulings referred to in Part IV, *supra*. The *West-Oklahoma Tax Commission* attitude has been silently dropped, and its reasoning no longer utilized. As their texts reveal, those two opinions were the yield of a period in which the Supreme Court was intent on doing away with the various forms of intergovernmental tax immunity, and Indian tax exemption had been supported on that theoretical basis. For at least the last fifteen years, the judicial climate has changed to concentrate, not on the relationship of Indian tax immunity to other exemptions, but on the particular social goals Congress has sought to reach through its restrictions on Indian properties.

B. It seems clear, too, that in deciding *Oklahoma Tax Comm'n* and *West*, the Supreme Court thought (at that time) that restricted Indians were subject to both federal income and estate taxes with respect to restricted and trust property—and that this was an important factor in the decisions. The *Oklahoma Tax Commission* opinion indicates this very plainly. 319 U.S. at 601, 608, including fn. 12 (relating to the federal estate tax). The Court referred (at 601) to *Superintendent* v. *Commissioner*, 295 U.S. 418, as broadly holding "that the restricted income of Indians was subject to the federal income tax" (see note 8, *supra*), and observed (319 U.S. at 608): "Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes." [12]

---

[12] The brief for the United States, on behalf of the Indians, in *Oklahoma Tax Commission* expressly agreed that the federal estate tax was applicable.

In *West*, the briefs before the Supreme Court show that the Oklahoma Tax Commission (the appellee) stressed that Osage trust properties were then subject to both federal income tax and federal estate tax; as to the latter, the brief included a letter from the Commissioner of Internal Revenue saying that federal estate taxes were being imposed on and collected from estates of restricted Osage Indians.[13] West's brief did not dispute this assertion.

Today the situation is very different. *Squire* distinguished *Superintendent* v. *Commissioner*, *supra*—despite its unqualified language—as limited to reinvestment income (351 U.S. at 9), and held direct, initial income of those restricted Indians nontaxable. Income from Osage properties of the kind now at stake has been specifically held not subject to federal income tax. *Big Eagle* v. *United States*, *supra*, 156 Ct. Cl. 665, 300 F. 2d 765 (1962). And the Internal Revenue Service has ruled that this property is likewise immune from the federal estate tax (see Part IV, *supra*). The demand for equal treatment of state and federal taxes, which seemed to move the Court in *Oklahoma Tax Commission* and *West*, now works the other way—against taxibility.[14]

---

[13] The Service limited this determination to estates of Indian decedents dying after June 25, 1940, when it was decided to impose the tax on this type of estate.

The vagaries of federal income taxation of restricted Indian income are recited in the Supplemental Memorandum for the Petitioner, in *Squire* v. *Capoeman*, U.S. Sup. Ct., Oct. Term 1955, No. 134. At the time of *West* and *Oklahoma Tax Commission* it appears that the tax was being collected under an opinion of the Attorney General holding it applicable. See, also, *Squire*, 351 U.S. at 8-9.

[14] In *Landman* v. *United States*, 103 Ct. Cl. 199, 209-10, 58 F. Supp. 836 (1945), this court indicated that property exempt from state estate taxes was also necessarily exempt from the federal estate tax; and in the decision which led to *West* the Supreme Court of Oklahoma considered that state and federal immunity or lack-of-immunity was correlative. *Yarbrough* v. *Oklahoma Tax Comm'n*, 200 Okla. 402, 193 P. 2d 1017, 1020-21 (1947), *aff'd*, 334 U.S. 841 (1948).

C. Though *Squire* dealt with the General Allotment Act and the Osage statute contains different wording, the developments since *Squire* have shown that no distinction should be made on the basis of the particular language of the various pieces of Indian allotment legislation. The lower courts have applied the *Squire* principles to Indians not covered by the general act (*Kirkwood* v. *Arenas; Big Eagle* v. *United States; United States* v. *Hallan*), and the Internal Revenue Service has used them for the Osages (Technical Advice Memo, Aug. 15, 1969). See Parts IV and V A, *supra*. As both this court (in *Big Eagle*) and the Revenue Service have said, the terms of the Osage Allotment Act (see Part IV A, *supra*) are sufficiently close to those of the General Allotment Act to require the same approach and the same reading.[15]

D. Nor can we properly distinguish *Squire* as involving an income tax, not a death levy. *West*, it is true, does differentiate death taxes from property taxes as "imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits" (334 U.S. at 727). This dissimilarity seems to have been noted solely in connection with that taxpayer's argument that there was a difference between the Indian-owned-but-restricted property in *Oklahoma Tax Commission* and the United States-owned-trust property in *West*; the Supreme Court uses the incidence of the estate tax to show that the difference from *Oklahoma Tax Commission* was not meaningful in the context of tax immunity.

---

[15] In particular, the portions of the Osage Act which forbid trust assets from being "subject to lien, levy, attachment, or forced sale to satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency", and provide that "all royalties and bonuses arising therefrom [the Osage mineral lands] * * * shall be disbursed to members of the Osage Tribe or their heirs or assigns as now provided by law."

In any event, the *Squire* rationale, rather than this distinction in *West*, has been carried over to death taxes by the Internal Revenue Service (for federal estate taxes)[16] and by lower courts (for both federal and state death taxes). See Part IV, *supra*. We, too, see no reason for carving out estate and inheritance taxes for separate treatment. The *Squire* principles—especially the warning against diminution of restricted assets through payment of taxes—apply at least equally, perhaps even more, to death levies with their possible successive and cumulative impact before the restriction ends.

E. *Squire* related, of course, to a federal tax, and we are now concerned with a state impost, but that does not make the *Squire* reasoning irrelevant. As we have pointed out, the same factors which influenced the Court to find immunity from the federal income tax in the allotment legislation are present for death taxes, state or federal. The Internal Revenue Service has agreed for the federal estate tax. It is clear that Congress has the power to immunize these restricted properties from state levies.[17] *Cf. Warren Trading Post Co.* v. *United States*, 380 U.S. (1965); *Williams* v. *Lee*, 358 U.S. 217 (1959). And it would be strange and uncharacteristic for Congress to withhold the federal estate tax (on the ground it could deplete the corpus) but to authorize the comparable state levy.

---

[16] Defendant's brief says candidly that "Revenue Ruling 69-164 [see Part IV, *supra*] has the appearance of being contrary to the decision of the Supreme Court in *West*." There is, however, no suggestion that the ruling is being (or has been) repudiated.

[17] No argument is made by the defendant or Oklahoma that Congress is without power to exempt such Indian estates from state taxation.

However, a statement in *Oklahoma Tax Commission* is stressed—"If Congress intended to relieve these Indians from the burden of a state inheritance tax as a consequence of our National policy toward Indians, there is still no reason why we should imply that it intended the burden to be borne so heavily by one state." 319 U.S. at 609. That observation was probably made in the belief that federal income and estate taxes were collectible (see Part VI B, *supra*), an assumption no longer so. Moreover, Oklahoma does not now appear to be singled out; since *Squire*, other states inhabited by Indians with restricted property are no doubt under the same disability. See *Kirkwood* v. *Arenas*, *supra*, 243 F. 2d 863 (C.A. 9, 1957) (California inheritance tax).[18]

F. At the end of the *West* opinion, the Court appends the unelaborated remark that *Oklahoma Tax Commission* "makes clear that should any of the properties transferred be exempted by Congress from direct taxation they cannot be included in the estate for inheritance tax purposes. No such properties are here involved, however." 334 U.S. at 727-28. When it adopted those sentences, the Court, in all probability, considered the Osage trust properties to be subject to federal income tax (Part VI B, *supra*), and that may have been the reason why it thought no properties exempt from direct taxation were there involved. The income tax is often characterized as a "direct tax" (that is why the Sixteenth Amendment had to be adopted, *cf. Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, 158 U.S. 601 (1895)). Currently, however, income from Osage trust property is exempt. The final qualification in *West* may therefore have be-

[18] In quite different contexts, the Osage Allotment Act contains a few express provisions for taxation by the state. It is not argued that any of these apply to the estate tax as involved here, and we are satisfied that they do not.

come effective to remove the restricted property from the state tax even under the *West* opinion itself.[19]

G. On these grounds, we feel compelled to conclude that, because of the developments from *Squire* on, the *West* result is no longer controlling on us, and the opposite holding is mandated here. This leads directly to our ruling that the state tax was not owed, and that plaintiffs are entitled to recover from the United States for its breach of fiduciary duty in paying the tax when it should not. We may turn out to be mistaken, but the decision we make is the one we believe would be "the event of an appeal in the case before us" (Judge Learned Hand, dissenting in *Spector Motor Service, Inc.* v. *Walsh*, 139 F. 2d 809, 823 (C.A. 2, 1943)).[20]"

---

[19] On the other hand, the Court may possibly have meant to include only property which is immune from direct property taxation (see *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. at 610-11). Congress has expressly authorized Oklahoma to collect a gross production tax on minerals, before the headright pro-rata income distribution is made. Acts of March 3, 1921, 41 Stat. 1249, and of April 25, 1940, 54 Stat. 168. Perhaps the Court considered this tax as showing that the involved properties had not been exempted by Congress from direct taxation.

Since defendant sees this production tax as somehow supporting the imposition of the state death tax, we note that we cannot infer from an express and limited grant of power to tax a more general and unlimited right which is unexpressed.

[20] Judge Hand said:

"It is always embarrassing for a lower court to say whether the time has come to disregard decisions of a higher court, not yet explicitly overruled, because they parallel others in which the higher court has expressed a contrary view. I agree that one should not wait for formal retraction in the face of changes plainly foreshadowed; the higher court may not entertain an appeal in the case before the lower court, or the parties may not choose to appeal. In either event the actual decision will be one which the judges do not believe to be one which the higher court would make. * * * Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant; on the contrary I conceive that the measure of its duty to to divine, as best it can, what would be the event of an appeal in the case before it."

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Historical Review of Cases in This Court Reflecting Attempts by States to Tax Indians	3
II: Review of Recent Efforts by Congress to Transfer General Jurisdiction Over Indians to States	8
III. Analysis of the Cases Relied on Below	12
CONCLUSION	15

TABLE OF CITATIONS

Cases:

Asenap v. *United States*, 283 F. Supp. 566 (W.D. Okla. 1968)	6
Beartrack v. *United States*, Ct. Cl. Docket 281-67	6
Big Eagle v. *United States*, 300 F.2d 765 (Ct. Cl. 1962)	6, 12
Blackbird v. *CIR*, 38 F.2d 976 (10th Cir. 1930)	12
Carpenter v. *Shaw*, 280 U.S. 363 (1930)	4
Childers v. *Beaver*, 270 U.S. 555 (1926)	4
Choteau v. *Burnet*, 283 U.S. 691 (1931)	12
CIR v. *Walker*, 326 F.2d 261 (9th Cir. 1964)	2
Commissioner v. *Brun*, 286 Minn. 43, 174 N.W.2d 120 (1970)	2
Draper v. *United States*, 164 U.S. 240 (1896)	8
Ghahate v. *Bureau of Revenue*, 80 N.M. 98, 451 P.2d 1002 (1969)	2
Graves v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939)	4
Kake Village v. *Egan*, 369 U.S. 60 (1962)	14
Kansas Indians, The, 72 U.S. 737 (1866)	3

Page

Kennerly v. *District Court*, 400 U.S. 423 (1971) 8
Kirkwood v. *Arenas*, 243 F.2d 863 (9th Cir. 1957) 6
Leahy v. *State Treasurer of Oklahoma*, 297 U.S. 420 (1936) 12
Mason v. *United States*, —— F.2d —— (June 16, 1972, Ct. Cl. Docket 417-70) 7
Menominee Tribe v. *United States*, 391 U.S. 404 (1968) 11
Metlakatla Indians v. *Egan*, 369 U.S. 45 (1962) 12, 13
Nash v. *Wiseman*, 227 F. Supp. 552 (W.D. Okla. 1963) 6
Oklahoma Tax Commission v. *United States*, 319 U.S. 598 (1943) 4, 5, 6, 7, 12
Squire v. *Capoeman*, 351 U.S. 1 (1956) 6, 7, 11
Superintendent Five Tribes v. *Commissioner*, 295 U.S. 418 (1935) 6
United States v. *Daney*, 370 F.2d 791 (10th Cir. 1966) 6
United States v. *Hallam*, 304 F.2d 620 (10th Cir. 1962) 6
United States v. *Rickert*, 188 U.S. 432 (1903) 3, 5
Utah & Northern Railway v. *Fisher*, 116 U.S. 28 (1885) 8
West v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948) 5, 6, 7
Williams v. *Lee*, 358 U.S. 217 (1959) 8, 14
Worcester v. *Georgia*, 31 U.S. 515 (1823) 8

Termination Acts:

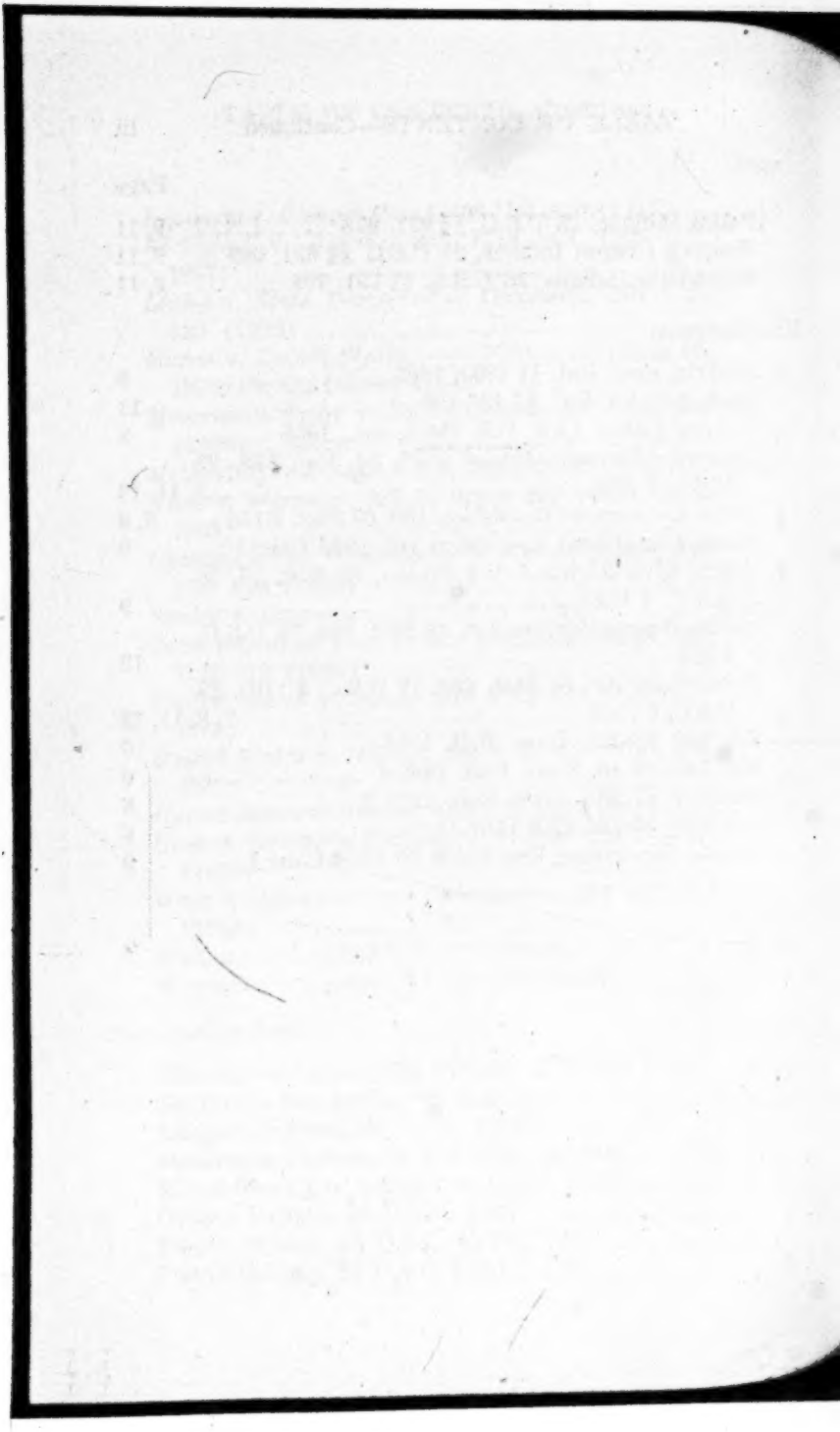
Alabama and Coushatta Indians, 25 U.S.C. § 721 9
California Rancherios, 72 Stat. 619 .... 9, 11
Klamath Indians, 25 U.S.C. § 564 .... 9, 11
Menominee Indians, 25 U.S.C. §§ 891, 898 .... 9, 11
Mixed-Blood Ute Indians, 25 U.S.C. § 677 .... 9, 11
Ottawa Indians, 25 U.S.C. § 841 9
Paiute Indians, 25 U.S.C. §§ 741, 749 .... 9, 11
Peoria Indians, 25 U.S.C. § 821 9

Page

Ponca Indians, 25 U.S.C. §§ 971, 978 ..... 9, 11
Western Oregon Indians, 25 U.S.C. §§ 691, 699 .... 9, 11
Wyandotte Indians, 25 U.S.C. §§ 791, 798 ..... 9, 11

Miscellaneous:

86 Ariz. Rev. Stat. §§ 1801, 1865 9
Buck Act, 4 U.S.C. §§ 105-109 11
Federal Indian Law, U.S. Dept. Int., 1958 8
General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331 ..... 3, 11, 13
House Concurrent Resolution 108, 67 Stat. B132 .... 8, 9
House Concurrent Resolution 102 (92d Cong.) 9
Indian Civil Rights Act, § 401(a), 82 Stat. 77, 25 U.S.C. § 1321 9
Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. § 461 13
Public Law 280, 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360 ..... 7, 8, 11, 13
Rev.Rul. 56-342, Cum. Bull. 1956-2 6
Rev.Rul. 62-16, Cum. Bull. 1962-1 6
Rev.Rul. 67-284, Cum. Bull. 1967-2 6
Rev.Rul. 69-164, IRB 1969-14 6
Senate Concurrent Resolution 26 (92d Cong.) 9



IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-834

ROSALIND MCCLANAHAN,
Appellant,

v.

ARIZONA STATE TAX COMMISSION,
Appellee.

On Appeal from the Supreme Court of Arizona

BRIEF FOR AMICUS CURIAE, NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF APPELLANT

STATEMENT OF INTEREST

This brief is filed with the consent of both parties.

Amicus Curiae, the National Congress of American Indians (NCAI), is a nonprofit association of some 147 Indian tribes, including virtually all of the major organized tribes (but not including the Navajo Tribe, appellant's tribe). Its purpose is to promote the in-

terests of American Indians. It was incorporated in Oklahoma in 1954, and its national headquarters is at 1346 Connecticut Avenue, N.W., Washington, D.C.

NCAI supports the position of the Appellant Navajo Indian, Rosalind McClanahan, and joins her in asserting that the decision of the Arizona Supreme Court was erroneous. NCAI is deeply concerned with the Arizona court's decision, because it represents one more example of a state attempting to extend its jurisdiction over a reservation Indian without the consent of the tribe governing the reservation. It is a flagrant interference with and usurpation of the tribe's governmental powers over its people. It is wrong in every case where the tribe has not consented, and it is illegal in this case because Congress has not consented.

SUMMARY OF ARGUMENT

We believe the Appellant's brief, and the brief filed by the Solicitor General July 19, 1972, cover most of the points ably and correctly. What we have to say herein is intended to supplement what they have said, and hopefully will be helpful to the Court.

In Section I we review the history of the cases in this Court dealing with attempts by states to tax Indians. The early cases involve taxes on property or income from property. Not until recently have taxes on income from an Indian's personal services come into question,[1] but the earlier cases on property taxes are an essential background for approaching the salary tax question.

---

[1] Until the instant case, and *Comm'r* v. *Brun*, 286 Minn. 43, 174 N.W. 2d 120 (1970) (rejecting the tax) and *Ghahate* v. *Bureau of Revenue*, 80 N.M. 98, 451 P. 2d 1002 (1969) (upholding the tax), the only case of which we are aware involving taxes on an Indian's wage or salary is *CIR* v. *Walker*, 326 F. 2d 261 (9th Cir. 1964), upholding the federal income tax on salary of a tribal employee.

In Section II we review the modern history of efforts of Congress to transfer general jurisdiction over Indians to the states.

In Section III we analyze some of the cases relied on by the court below.

ARGUMENT

I. Historical Review of Cases in This Court Reflecting Attempts by States to Tax Indians

One of the earliest cases (if not the earliest case) recognizing an Indian's exemption from state taxes was the 1866 case of *The Kansas Indians*, 72 U.S. 737. In that case this Court held that certain individual Shawnee lands in Kansas, given to them before Kansas became a state, were exempt from state property taxes, because as long as the tribe continued to govern itself as a distinct entity, Kansas had no jurisdiction over the lands, having (like Arizona in the principal case) foresworn such jurisdiction as a condition of its admission into the Union. At p. 756. This Court said:

> "As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws." At p. 757.

In 1903 this Court in *United States* v. *Rickert*, 188 U.S. 432, held that Sioux trust allotments under the General Allotment Act of 1887 (which provided that the allotments were to be free of incumbrance) were exempt from South Dakota property taxes. This Court relied on two rationales—(1) that the allotment was a federal instrumentality and hence not taxable by the state, and (2) that if the trust property is to be free of incumbrance, it must be free of taxes. Not only was the land

held exempt from state taxes, but horses, cows and wagons on the land as well.

In 1926 this Court held that Oklahoma could not impose an inheritance tax on a Quapaw's restricted allotment, because it was federal instrumentality. *Childers* v. *Beaver*, 270 U.S. 555 (1926). In 1930, this Court held that where a Choctaw allotment was tax exempt under a treaty, Oklahoma could not impose a tax on certain mineral rights associated with the allotment, citing the federal instrumentality rule and Oklahoma's acceptance, upon admission into the Union, of the Indians' tax exempt status. *Carpenter* v. *Shaw*, 280 U.S. 363 (1930).

In the late 1930's and early 1940's, the federal instrumentality doctrine as a basis for exemption from state taxation was severely limited, first with respect to federal employees, *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939), and later with respect to Indians, *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943). The latter case allowed an Oklahoma death tax on restricted cash and securities belonging to members of the Five Civilized Tribes, arising from the proceeds of sale of minerals on the Indians' restricted land. Some of the land was concededly exempt from "direct" taxation (presumably property taxes), and this Court refused to allow the death tax on that land. However, this Court upheld the tax on the cash and securities.

The main significance of the *Oklahoma Tax Comm'n* v. *United States* case is that it overruled the prior assumption that Indians were tax exempt under the federal instrumentality doctrine. However, it is important not to read this case as saying that Indians are taxable the same as anyone else. There were good reasons for holding those Indians taxable. This Court noted that the Five Civilized Tribes were not like other tribes; they had "no effective tribal autonomy," and had "little to

distinguish them from all other citizens except for their limited property restrictions and their tax exemptions. Their lands are held in fee, not in trust, as in the *Rickert* case. . . ." At p. 603. Furthermore, Congress had expressly made the minerals themselves "subject to all State and Federal taxes", and therefore, as this Court reasoned, Congress probably did not intend an exemption for the proceeds of their sale. At p. 606.

In 1948 this Court decided *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948), another Oklahoma death tax case. Unlike *Oklahoma Tax Comm'n* v. *United States*, this case involved property held by the United States in trust for the Indian, rather than property held by the Indian in fee subject to restrictions, and involved an Indian living on an Indian reservation.[2] The deceased Indian was a restricted Osage Indian, and his property, held in trust by the United States, included his "headright," i.e. a right to share in the proceeds of sale of minerals beneath the Osage Reservation. It was argued, inter alia, (1) that this and certain other property was held in trust by the United States, and therefore it was exempt from state taxation, and (2) that the property was exempt under the federal instrumentality rule. This Court rejected these, saying that *Oklahoma Tax Commission* v. *United States* showed that mere restriction of the property was not the equivalent of tax immunity, and had overruled the federal instrumentality rule. At p. 726.

It is extremely important to note, and the *West* case cannot be properly understood otherwise, that when this Court decided the *West* case, *it was generally assumed*

[2] This Court did not call the Osage reservation a "reservation," but it was and is in fact one, and the Bureau of Indian Affairs shows it as one on its maps (and as the only reservation still left in Oklahoma). As this Court recognized, the reservation was held by the United States in trust for the Osages, and while most of the land was allotted in trust to Indians, the tribe still owns in trust some tribal land and all of the minerals under the reservation.

that Indians were subject to both federal income and federal estate taxes with respect to their restricted and trust property.[3] Today, however, this assumption has been shown to be incorrect, and Indian trust property is exempt from both federal income taxes[4] and federal estate taxes.[5] Consequently, this Court's observation in

---

[3] In the *Oklahoma Tax Comm'n* v. *United States* case, this Court, 319 U.S. at 601, said that "the restricted income of Indians was subject to the federal income tax", and observed "Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes." Page 608 and 608n.12. The brief for the United States on behalf of the Indians in that case expressly agreed that Indian trust property was subject to the federal estate tax. And in the *West* case, the briefs before the Supreme Court showed that the Oklahoma Tax Commission stressed that Osage trust properties were then subject to both federal income taxes and federal estate tax, and West did not dispute this. In 1935, this Court had held that a restricted Creek Indian's income from investment of his trust funds was subject to federal income tax. *Superintendent Five Tribes* v. *Commissioner*, 295 U.S. 418 (1935). Until *Squire* v. *Capoeman*, note 4 below, this was assumed to apply to all Indian income; however, the *Squire* case limited the *Superintendent* ruling to reinvestment income only, and held that income from the basic trust property itself was tax exempt.

[4] *Squire* v. *Capoeman*, 351 U.S. 1 (1956), held that a restricted Indian was exempt from federal capital gains tax on proceeds of sale of trust timber. The cases and the Internal Revenue Service have interpreted this to apply to federal income taxes on all income from trust land, including from farming, grazing, sale of minerals, etc. *United States* v. *Daney*, 370 F.2d 791 (10th Cir. 1966); *Big Eagle* v. *United States*, 300 F.2d 765 (Ct. Cl. 1962); *United States* v. *Hallam*, 304 F.2d 620 (10th Cir. 1962); Rev.Rul. 56-342, Cum. Bull. 1956-2, 20; and Rev.Rul. 62-16, Cum. Bull. 1962-1; Rev.Rul. 67-284, Cum. Bull. 1967-2, 55; and see also *Kirkwood* v. *Arenas*, 243 F.2d 863 (9th Cir. 1957) (California income taxes barred).

[5] *Nash* v. *Wiseman*, 227 F.Supp. 552 (W.D.Okla. 1963); *Asenap* v. *United States*, 283 F.Supp. 566 (W.D.Okla. 1968). In 1967 a case was filed in the Court of Claims on behalf of a deceased restricted Osage Indian, *Beartrack* v. *United States*, Docket 281-67. This case sought refund of federal estate taxes previously collected. In 1968, after trial, the Government capitulated, and the Internal Revenue Service proceeded voluntarily to give refunds to the estates of all deceased restricted Osage Indians. See Rev.Rul. 69-164, IRB 1969-14, 20. Eventually some $4.5 million was refunded.

the *Oklahoma Tax Commission* v. *United States* case (319 U.S. at 608) that "Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes" [6] is turned around to exactly the reverse: i.e., if Congress intended to *bar* federal income and death taxes on trust property, as the courts have now established, then a fortiori it can hardly have intended by implication to allow the states to impose such taxes.[7]

As the Court will observe, the above cases deal with state attempts to tax Indian trust or restricted property (or income therefrom), and not with attempts to tax income from the tribal Indian's own labors. With respect to the latter, we will concede that we are aware of no congressional statute expressly or impliedly conferring any tax exemption. Instead, the exemption is found in the general legal status of tribal Indians, which is that, as subjects of semi-independent tribal sovereigns, they are subject to their own laws exclusively, except to the extent that Congress has by statute extended federal jurisdiction to them, or authorized the states to do so. Arizona has no general jurisdiction over the Navajo Reservation, having declined to accept Public Law 280 (see text at note 9 below), nor has Arizona ever been authorized to extend its taxing laws onto the reservation and attach to Indians living thereon. Consequently, the tax in this case is invalid.

---

[6] In any case, this is a very dubious syllogism, in light of the emerging consensus on Indian taxation and relationships with states.

[7] The rationale of the *West* case was impliedly overruled by this Court in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), discussed in note 4 above. This overruling has been impliedly recognized by a number of lower court rulings in analogous cases since 1956, and the overruling has been explicitly recognized and fully discussed by the Court of Claims in a recent case involving the same tribe of Indians as in the *West* case. *Mason* v. *United States*, —— F.2d —— (June 16, 1972, Docket 417-70.) The Mason heirs intend to file an amicus brief quoting the Court of Claims opinion.

II. Review of Recent Efforts by Congress to Transfer General Jurisdiction Over Indians to States

Prior to 1953, Indian reservations ordinarily were subject to federal and tribal law exclusively, and state law did not apply to Indians on the reservation.[8]

In 1953 a wave of feeling erupted in Congress to "get out of the Indian business." In that year it passed House Concurrent Resolution 108 (83rd Congress) that it was

> ". . . the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States. . . ." 67 Stat. B132.

In the same year, Congress enacted Public Law 280, 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360, extending state law and state court jurisdiction to Indian reservations in California, Minnesota (except Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation), and Wisconsin (except Menominee Reservation). The Act invited other states to extend their civil and criminal jurisdiction to Indian reservations, and to date eight additional states have done so, in whole or in part (Alaska, Florida, Idaho, Montana, Nevada, North Dakota, South Dakota and Washington).[9]

---

[8] *Worcester* v. *Georgia*, 31 U.S. 515 (1823); *Williams* v. *Lee*, 358 U.S. 217 (1959); *Kennerly* v. *District Court*, 400 U.S. 423 (1971); U.S. Dept. Int., *Federal Indian Law* (1958); 845-6. However, state law does enter an Indian reservation and apply to non-Indians there. *Draper* v. *United States*, 164 U.S. 240 (1896) (criminal law); *Utah & Northern Railway* v. *Fisher*, 116 U.S. 28 (1885) (tax law).

[9] Even prior to Public Law 280, a few states had been given certain jurisdiction over Indian reservations by special statute, e.g. in New York and Kansas.

Arizona has not done so, unless certain limited pollution legislation is considered as such.[10]

Another manifestation of Congress' then mood was the so-called "termination" acts. This movement began in 1954 with the termination of federal supervision over six Indian groups.[11] However, problems caused by termination, and Indian and non-Indian opposition, soon caused this movement to peter out.[12]

House Concurrent Resolution 108 is no longer the policy of Congress. Even if it survived the 83d Congress as a viable instrument to express Congress' wishes, which is dubious, the Senate repealed it on December 11 1971 (S. Con. Res. 26, 92d Cong.), and the House is considering repealing it (H. Con. Res. 102, 92d Cong.). Public Law 280 is still on the books, but in 1968 Congress re-enacted it as part of the Indian Civil Rights Act, 82 Stat. 77, and added the fundamental requirement that no state could thereafter extend its jurisdiction to an Indian reservation without the tribe's consent. Section 401(a), 82 Stat. 78, 25 U.S.C. §§ 1321, 1322.

As for the termination movement, no tribe has been terminated since 1962, and the Menominee Tribe is endeavoring to persuade Congress to repeal the Menominee Termination Act. S. 3514 and H.R. 14556, 92d Congress.

President Nixon's message to Congress of July 8, 1970, declared the Administration's position as follows:

---

[10] 36 Ariz. Rev. Stat. § 1801, 1865. As the Govt's brief points out, p. 15n.5, an unanswered question is whether a state may validly accept only partial jurisdiction under Public Law 280.

[11] Klamath Indians, 25 U.S.C. § 564; Mixed-Blood Ute Indians, 25 U.S.C. § 677; Western Oregon Indians, 25 U.S.C. § 691; Alabama and Coushatta Indians, 25 U.S.C. § 721; Paiute Indians, 25 U.S.C. § 741; Menominee Indians, 25 U.S.C. § 891.

[12] The Wyandotte and Ottawa Indians were terminated in 1956, 25 U.S.C. §§ 791 and 841, and the Peoria Indians and some California rancherias were terminated in 1958, 25 U.S.C. § 821, and 72 Stat. 619. Since then the only termination act has involved the Ponca Indians, 25 U.S.C. § 971 (1962).

"This policy of forced termination is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.

"This goal, of course, has never been achieved. But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American."

Some of the same reasoning applies to transfer of jurisdiction to the states without the consent of the tribes, which amounts to partial termination of tribal self-government, and which was possible under Public Law 280 until it was amended in 1968.

We recite all of this background to show the Court what resistance Indians and others have made to the

extension of state jurisdiction over Indian reservations, and the traditional explicitness with which Congress has acted, when it has acted at all.[13] It is totally inconsistent with this historical background and the cases to permit Arizona's taxing power to enter the Navajo Reservation and attach to Indian income or property there.

The termination acts, incidentally, support the assumption that tribal members are not subject to state taxes prior to termination.[14] For example, the Klamath Termination Act, 25 U.S.C. § 564j, provides that after property is distributed to the Indians,

> ". . . such property and any income derived therefrom by the individual . . . shall be subject to the same taxes, State and Federal, as in the case of non-Indians. . . ."

Other termination acts have similar provisions.[15] Under the *Capoeman* rationale, this would seem to imply tax exemption for unterminated tribes.[16]

---

[13] For example, as noted in Appellant's brief, p. 25, Congress has aside from Public Law 280 authorized states to extend their taxing power into federal areas, but Indians are exempted from this. Buck Act, 4 U.S.C. §§ 105-109.

[14] Even in the case of a terminated tribe, the tribe may retain certain immunities from state law. See *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968).

[15] Mixed-Blood Ute Termination Act, 25 U.S.C. § 677p; Western Oregon Termination Act, 25 U.S.C. § 699; Paiute Termination Act, 25 U.S.C. § 749; Wyandotte Termination Act, 25 U.S.C. § 798; Menominee Termination Act, 25 U.S.C. § 898; Ponca Termination Act, 25 U.S.C. § 978, and California Rancheria Termination Act, 72 Stat. 619, § 2(d).

[16] See *Squire* v. *Capoeman*, 351 U.S. 1 (1956), where one of the important reasons for the Court's decision was the fact that the 1906 amendment to the General Allotment Act provided that upon termination of the trust period, "all restrictions as to . . . taxation of said land shall be removed . . . ." This Court said this implied that prior to such termination, the land was to be free of all taxes. 351 U.S. at p. 8.

III. Analysis of the Cases Relied on Below

The court below (Juris. St. p. 4a) relied on *Leahy* v. *State Treasurer of Oklahoma*, 297 U.S. 420 (1936), as upholding a state income tax on the headright income of an Osage Indian. But that case involved an *unrestricted* Indian, who had received a certificate of competency. Therefore, under the applicable Osage statutes, as earlier interpreted by this Court, *Choteau* v. *Burnet*, 283 U.S. 691 (1931) (and still good law), Leahy was as subject to state income tax on his headright income as a non-Indian. Had Leahy been a *restricted* Osage, his headright income would not have been subject to federal tax,[17] and a fortiori not state tax either.

The court below (Juris. St. p. 4a) also relied on *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943), where this Court allowed a state death tax on restricted Indian property. But that case does not support the decision below, because that case did not involve an Indian reservation. There the Indians owned their land in fee, subject only to certain restrictions on alienation. They lived in an Indian community, perhaps, but the reservation had long since been abolished, and the state had complete general jurisdiction over the area where the Indians and their property were located. Arizona, in contrast, does not have general jurisdiction over the Navajo Reservation.

The court below (Juris. St. p. 5a) also relied on *Metlakatla Indians* v. *Egan*, 369 U.S. 45 (1962), where state fish trap laws were held to apply to Indians on a reservation in Alaska. But that reservation was a highly special one. Not only were these Indians immigrants from Canada, but this Court noted that they had "very substantially" adopted and been adopted by the white

---

[17] *Big Eagle* v. *United States*, 300 F.2d 765 (Ct.Cl. 1962); *Blackbird* v. *CIR*, 38 F.2d 976 (10th Cir. 1930).

man's civilization, and "were never in the hostile and isolated position of many tribes in other states," at pp. 50-51, and that "there was never an attempt in Alaska to isolate Indians on reservations. Very few were ever created, and the purpose of these, in contrast to many in other states, was not to confine the Indians for the protection of the white settlers but to safeguard the Indians against exploitation." At p. 51.[18] Previous cases had applied Alaska territorial (not federal) laws to the Metlakatla Reservation. At pp. 51-52. Public Law 280 applied there. At p. 56. The Reservation was further unique in that the Secretary of the Interior was given regulatory power over it. At p. 53. Because of this latter power, and the uncertainty whether the Secretary had exercised it so as to exempt the Indians from the state fish trap law, the case was remanded.

We agree that the *Metlakatla* opinion supports the application of state law to Indians on an Indian reservation. However, that opinion is self-distinguishing by its emphasis on the uniqueness of that reservation and the de facto assimilation of the Indian residents. The principle should not be extended to a reservation where the

---

[18] We seriously question the accuracy of the implication that reservations in the continental U.S. were for the protection of the settlers. It is our understanding that protection of settlers was not a common motive at all, especially not after the mid-1800's. We believe the common motive was to shrink the tribal jurisdiction and make land available to the settlers. After 1887, with the General Allotment Act, 24 Stat. 388, 25 U.S.C. §§ 331ff, Congress began the long and generally unsuccessful effort to break up the reservations and assimilate the Indians. This was finally abandoned in 1934 with the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. §§ 461ff, which laid the foundation for piecing the tattered reservations back together again and breathing new life into tribal governments. As detailed in the preceding section, there was a flurry of "termination" fever in the 1950s, but that did not take root, and the present course of events today is strongly proceeding down the path of tribal self-government and strengthening of the reservations and their governments.

Indian residents remain a distinct, self-governing community, and have not assimilated into the local white society.

The court below also mentioned *Kake Village* v. *Egan*, 369 U.S. 60 (1962), a companion case to *Metlakatla*. But as the court noted, there was no reservation in *Kake*, and so the case is not helpful.

The lower court believed that the question was whether the state income tax would infringe "on the right of the Reservation Indians to make their own laws and be ruled by them." Jurisd. St. p. 4a, quoting *Williams* v. *Lee*, 358 U.S. 217 (1959). *Williams* does say this, but also said, more generally and more accurately, that

> "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." 358 U.S. at 220.

We agree with Appellant that the test whether state laws infringe on the right of Indian self-government is a test that comes into force once it has been determined that state laws apply at all to the Indians on a reservation, something which is not true of the Navajo Reservation.

CONCLUSION

The State of Arizona can point to neither an act of Congress nor a decision of this Court, nor of any federal court, authorizing it to impose its general income taxes on Indians residing within an Indian reservation. Consequently, the Navajos residing on their reservation are not subject to Arizona income taxes. The judgment below should be reversed.

Respectfully submitted,

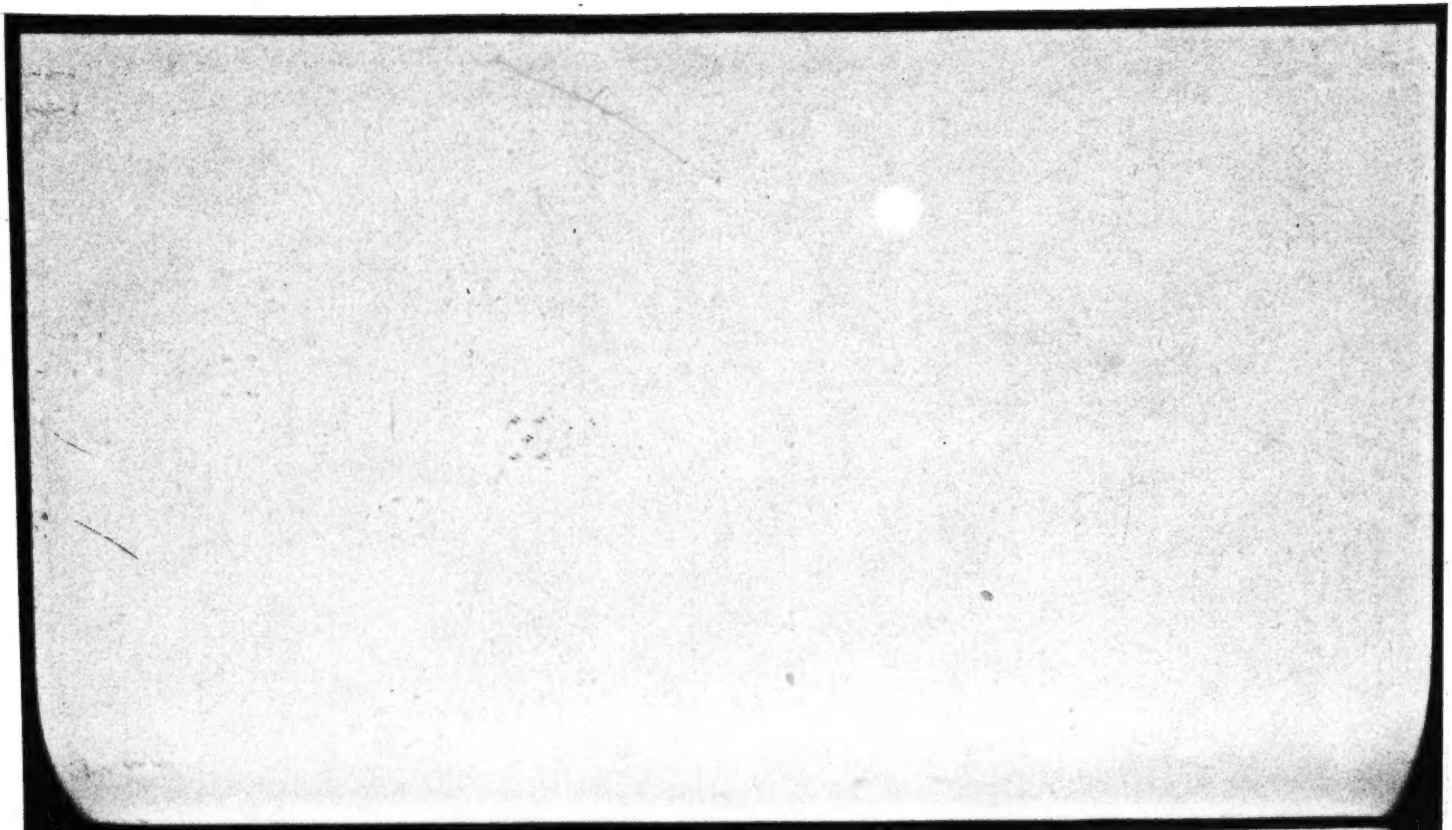
CHARLES A. HOBBS

Counsel for Amicus Curiae, National Congress of American Indians, Inc.

1616 H Street, N. W.
Washington, D.C. 20006

WILKINSON, CRAGUN & BARKER
Of Counsel

July 21, 1972



INDEX

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	
I. EXPRESS CONGRESSIONAL AUTHORIZATION NOT ESSENTIAL FOR VALIDTY OF STATE ACTION	8
II. IMPOSITION OF ARIZONA INCOME TAX DOES NOT IMPAIR ANY RIGHTS GRANTED OR RESERVED BY FEDERAL LAW	15
III. IMPOSITION OF ARIZONA INCOME TAXES DOES NOT INFRINGE UPON INDIAN RIGHT OF SELF GOVERNMENT	27
IV. INDIAN RESIDENTS OF NAVAJO RESERVATION ARE SUBJECT TO STATE INCOME TAX	30
V. SOME RAMIFICATIONS OF APPELLANT'S POSITION	35
CONCLUSION	41

INDEX

CITATIONS

Cases	Page
Begay v. Sawtelle 53 Ariz. 304 88 P.2d 999 (1939)	37
Bradley v. Arizona Corp. Comm'n 60 Ariz. 508 141 P.2d 524 (1943)	37
Brown v. Bd. of Education 347 U.S. 483 74 S.Ct. 686 98 L.Ed. 873 (1954)	38
Commission of Internal Revenue v. Walker 326 F.2d 261 (9th Cir. 1964)	29
Comm'r of Taxation v. Brun 147 N.W.2d 120 (Minn. 1970)	33,35
Denison v. State 34 Ariz. 144 268 P. 617 (1928)	36
Draper v. United States 164 U.S. 240 17 S.Ct.Rptr 107 (1896)	17
Ghahate v. Bureau of Revenue 80 N.M. 98 451 P.2d 1002 (1969)	19,23,32

Cases	Page
Graves v. New York 306 U.S. 466 59 S.Ct. 595 83 L.Ed. 927 (1938)	28
Harrison v. Laveen 67 Ariz. 337 196 P.2d 456 (1948)	36
Holt v. Comm'r Int. Rev. 364 F.2d 38 (1966)	31
Kansas Indians 5 Wall. 737 (1866)	12
Kennerly v. District Court of Montana 440 U.S. 423 91 S.Ct. 480 27 L.Ed.2d 507 (1971)	9,25
Klahr v. Williams 339 F.Supp. 922 (1972)	36
Leahy v. State Treas'r of Oklahoma 297 U.S. 420 56 S.Ct. 507 80 L.Ed. 771 (1936)	32,35
McClanahan v. State Tax Comm'n 14 Ariz.App. 452 484 P.2d 221 (1971)	5,6,34
New York v. Martin 326 U.S. 496 90 L.Ed. 261 (1946)	12

Cases Page

Conroe v. New York
208 U.S. 466
79 S.Ct. 595
83 L.Ed. 927 (1938) 28

Harrison v. Laveen
67 Ariz. 337
196 P.2d 456 (1949) 36

Holt v. Comm'r Int. Rev.
264 F.2d 38 (1966) 31

Jones v. Indiana
7 Ariz. 117 (1956) 12

Kennedy v. District Court
of Montana
344 U.S. 429
81 S.Ct. 460
97 L.Ed.2d 507 (1971) 9,25

Black v. Williams
319 F.Supp. 922 (1972) 16

Lewis v. State Tress'r
of Oklahoma
295 U.S. 420
52 S.Ct. 507
80 L.Ed. 771 (1936) 32,35

McClanahan v. State Tax Comm'n
14 Ariz.App. 432
484 P.2d 221 (1971) 5,6,24

New York v. Martin
326 U.S. 496
80 L.Ed. 251 (1946) 12

Cases	Page
Oklahoma Tax Comm'n v. United States 319 U.S. 598 87 L.Ed. 1612 (1943)	31
Organized Village of Kake v. Egan 369 U.S. 60 82 S.Ct. 562 7 L.Ed.2d 573 (1962)	9,18,19,23,24
Porter v. Hall 34 Ariz. 308, 321 271 P. 411 (1928)	18
Powless v. State Tax Comm'n 253 N.Y.Supp.2d 438 (1964)	32
Silas Mason Company v. Tax Commission 302 U.S. 186 82 L.Ed. 187 (1937)	14
Sims v. United States 359 U.S. 108 79 S.Ct. 641 3 L.Ed.2d 667 (1959)	28
Squire v. Capoeman 351 U.S. 1 76 S.Ct. 611 100 L.Ed. 883 (1956)	31,32

Cases Page

Oklahoma Tax Comm'n v.
United States
345 U.S. 598
97 L.Ed. 1012 (1953) 31

Organized Village of Kake v. Egan
369 U.S. 60
82 S.Ct. 562
7 L.Ed.2d 573 (1962) 9,18,19,23,24

Perrin v. Bell
14 N.Y. 109, 321
271 N.Y. 411 (1936) 18

Phillips v. State Tax Comm'n
283 N.Y.Supp.2d 438 (1964) 32

Silas Mason Company v.
Tax Commission
302 U.S. 186
82 L.Ed. 187 (1937) 14

Slee v. United States
132 U.S. 108
79 S.Ct. 641
4 L.Ed.2d 667 (1959) 28

Spurr v. Spurrman
271 U.S. 1
70 S.Ct. 411
100 L.Ed. 803 (1956) 21,32

Case	Page
State Bd. of Public Welfare v. Bd. of Comm'rs 262 N.C. 475 137 S.E.2d 801 (1964)	37
State Tax Comm'n v. W. L. Barnes 178 N.Y.Supp.2d 932 (1958)	32
Surplus Trading Co. v. Cook 281 U.S. 647 50 S.Ct. 455 (1929)	19
United States v. McBratney 104 U.S. 621 26 L.Ed. 869 (1882)	12
Vermillion v. Spotted Elk 85 N.W.2d 432 (1957)	18,23
Warren Trading Post v. Arizona Tax Commission 380 U.S. 685 85 S.Ct. 1242 14 L.Ed.2d 165 (1965)	13,26,27
Williams v. Lee 358 U.S. 217 79 S.Ct. 269 3 L.Ed.2d 251 (1959)	8,9,24

Constitutions, Treaty & Statutes — Page

Act of August 15, 1953 (P.L. 280)
67 Stat. 588, Ch. 505, §§ 6,7 — 22,23,24,25

Alaska Enabling Act
72 Stat. 339 — 18,19

Arizona Constitution
Art. XX — 3,4,5

Arizona Enabling Act
36 Stat 557, 569, 570
(1910) — 3,4,5,10,14,15

Arizona Revised Statutes
§ 43-186(d)A.2 — 2
§ 43-188(f) — 2

Buck Act
54 Stat. 1059 (1940)
4 U.S.C. 105-110 (1947) — 26

General Allotment Act of 1887
24 Stat. 388
25 U.S.C. 331, et seq. — 32

Indian Civil Rights Act of 1968
25 U.S.C. 1324
82 Stat. 79
25 U.S.C. 1326
82 Stat. 80 — 24,25

Montana Enabling Act
25 Stat. 676 — 17

Constitutions, Treaty & Statutes	Page
Act of August 15, 1953 (P.L. 280) 67 Stat. 588, Ch. 505, §§ 6,7	22,23,24, 25
Alaska Enabling Act 72 Stat. 339	18,19
Article Constitution Art. IX	3,4,5
Arizona Enabling Act 45 Stat. 557, §§9, 570 (1910)	3,4,5,10,14,15
Arizona Revised Statutes § 43-186(A)(2) § 43-189(E)	2 2
Bank Act 39 Stat. 1939 (1940) 48 U.S.C. 108-110 (1947)	26
Bonneval-Allotment Act of 1887 24 Stat. 388 25 U.S.C. 331, et seq.	32
Indian Civil Rights Act of 1968 25 U.S.C. 1324 82 Stat. 79 25 U.S.C. 1326 82 Stat. 80	24,25
Montana Enabling Act 25 Stat. 676	17

Constitutions, Treaty & Statutes	Page
New Mexico Enabling Act 36 Stat. 557	19
North Dakota Enabling Act 25 Stat. 676	18
Treaty of June 1, 1968 15 Stat. 667	3,16,29,30
25 U.S.C. 86	11
25 U.S.C. 233	11
25 U.S.C. 348	11
25 U.S.C. 349	11
25 U.S.C. 355	11
25 U.S.C. 379	11
25 U.S.C. 398	11
25 U.S.C. 399	11
25 U.S.C. 401	11
25 U.S.C. 409a	11
25 U.S.C. 412a	11
25 U.S.C. 416i	11
25 U.S.C. 465	11
25 U.S.C. 487c	11
25 U.S.C. 492	11
25 U.S.C. 501	11
25 U.S.C. 564c	11
25 U.S.C. 608	11
25 U.S.C. 610b	11
25 U.S.C. 645	11
25 U.S.C. 674	11

Citations, Treaty & Statutes	Page
[illegible] Handling Act	
[illegible] 527	19
[illegible] Marine Handling Act	
[illegible] 676	18
[illegible] of June 3, 1968	
[illegible] 661	3, 16, 29, 30
[illegible] 90	11
[illegible] 333	11
[illegible] 318	11
[illegible] 160	11
[illegible] 158	11
[illegible] 570	11
[illegible] 188	11
[illegible] 389	11
[illegible] 401	11
[illegible] 409a	11
[illegible] 412a	11
[illegible] 416i	11
[illegible] 465	11
[illegible] 687a	11
[illegible] 492	11
[illegible] 501	11
[illegible] 364b	11
[illegible] 608	11
[illegible] 610b	11
[illegible] 645	11
[illegible] 674	11

Miscellaneous	Page
84 CONG. REC. 10685 (1939)	26
H.R. Rep. No. 848 83d Cong. 1st Sess.	23
Letter dated July 7, 1953 to The Honorable A. L. Miller from Assistant Secretary of the Interior	20
1953 U.S. Code Congressional and Administrative News 2409	23
2414	21

Page

84 CONG. REC. 10685 (1939) 26

H.R. Rep. No. 848
84th Cong., 1st Sess. 23

Letter dated July 7, 1933 to
The Honorable A. O. Miller from
Assistant Secretary of the Interior 20

19[illegible] U.S. Code Congressional
and Administrative News 2409 23
2414 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-834

ROSALIND McCLANAHAN, on behalf of herself and all others similarly situated,

Appellant,

vs.

ARIZONA STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of Arizona

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Rosalind McClanahan, appellant herein, is a citizen of the United States and an enrolled member of the Navajo Tribe of Indians. During the 1967 calendar year, the appellant

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-834

RONALD MCCLANAHAN, on behalf of himself
and all others similarly situated,

Appellant,

vs.

ARIZONA STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of Arizona

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Ronald McClanahan, appellant herein,
is a citizen of the United States and an en-
rolled member of the Navajo Tribe of Indians.
During the 1967 calendar year, the appellant

resided within the exterior boundaries of the Navajo Indian Reservation, on that part of the reservation which is in the State of Arizona. The appellant's income during 1967 was wholly derived from sources within the Navajo Indian Reservation. The total amount of tax withheld from the appellant's income pursuant to Ariz.Rev.Stat.Ann. § 43-188(f) was $16.20. Thereafter the appellant instituted a class action for refund in the Superior Court of Arizona in and for Apache County on June 17, 1969, pursuant to Ariz.Rev.Stat.Ann. § 43-186(d)A.2.

Appellee moved to dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted. A.1. The appellee based its position on the following premises: (1) the imposition of this income tax does not interfere with the

self government of the Navajo Tribe of Indians, (2) the Arizona Enabling Act, 36 Stat. 557, 570 (1910) and the Arizona Constitution, Art. XX do not prohibit the State of Arizona from taxing the income of Indians residing on a reservation; and (3) the Treaty of 1868 between the United States and the Navajo Tribe, 15 Stat. 667, does not contain any provision that would prohibit the imposition of the Arizona state income tax on that part of the Navajo Indian Reservation within the boundaries of the State of Arizona.

The appellant in responding to appellee's assertions, contended that (1) absent an act of Congress, Arizona has no power to tax appellant's income; (2) imposition of the tax interferes with powers essential to the self government of the Navajo Tribe;

and (3) the Arizona Enabling Act and Article XX of the Arizona Constitution preclude the State of Arizona from applying its income tax laws to Indians residing on the reservation.

A minute entry order was entered on October 16, 1969, granting the motion to dismiss of the State of Arizona. Thereafter the appellant filed a motion, dated October 22, 1969, for rehearing of order granting motion to dismiss and an amended complaint which appellant certified was mailed to the appellee on November 4, 1969. The appellee filed a motion to quash amended complaint dated November 7, 1969. By minute entry order of January 12, 1970, the Superior Court denied the appellant's motion for rehearing and ordered the striking and quashing of the appellant's amended complaint.

The Superior Court's amended opinion and order dismissed the appellant's complaint on January 12, 1970, holding that the State of Arizona did not require express congressional authority to tax appellant, and that the income tax imposed and collected by appellee did not interfere with tribal self government. A.6. The appellant filed a timely notice of appeal to the Court of Appeals of the State of Arizona.

The Court of Appeals affirmed the Superior Court's dismissal of the complaint on April 28, 1971, holding that the Arizona income tax did not infringe on the Navajo Tribe's right of self government and that the tax was not prohibited by the Arizona Enabling Act (Sec. 20, 36 Stat. 569) and the Arizona Constitution (Art. XX, Fourth). McClanahan v. State Tax Commission, 14 Ariz.

App. 452, 484 P.2d 221. On May 11, 1971, the appellant moved for a rehearing, which was denied on June 8, 1971. The appellant then filed a petition for review by the Supreme Court of Arizona on June 22, 1971, and that petition was denied on September 21, 1971. A.8.

The appellant filed the Notice of Appeal to the Supreme Court of the United States in the Superior Court, the court possessed of the record on October 4, 1971. A.1. The appellant secured an extension of time to docket the appeal, which was due on December 20, 1971, and the appeal was docketed on December 23, 1971.

SUMMARY OF ARGUMENT

The residual jurisdiction of states on Indian reservations has been recognized in

452, 464 P.2d 221. On May 12, 1971, the appellant moved for a rehearing, which was denied on June 8, 1971. The appellant then filed a petition for review by the Supreme Court of Arizona on June 22, 1971, and that petition was denied on September 21, 1971. A.R.

The appellant filed the Notice of Appeal to the Supreme Court of the United States in the Superior Court, the court possessed of the record on October 4, 1971. A.R. The appellant secured an extension of time to docket the appeal, which was due on December 20, 1971, and the appeal was docketed on December 23, 1971.

SUMMARY OF ARGUMENT

The residual jurisdiction of states on Indian reservations has been recognized in

the rule that state laws may apply to Indians unless such application would interfere with reservation self government or impair a right granted or reserved by federal law. Imposition of a state personal income tax on residents of an Indian reservation, including Indians, does not interfere with reservation self government or impair any right granted or reserved by federal law.

No act of Congress prohibits the imposition of state income taxes on Indians residing on Indian reservations or creates any rights which would be impaired by imposition of a state income tax on the income of such Indians. The right of states to impose such income taxes has been repeatedly recognized. By reason of statehood Arizona has the jurisdiction to impose its income tax on Indian reservations and Arizona has

never surrendered that jurisdiction.

The plain implication of the language used in the rule referred to above of the test of validity of state action is that state jurisdiction on Indian reservations does not depend upon express congressional authorization. This rule recognizes the power of Congres, the Indian right of self government and the role of the state in bridging gaps in the law applicable to Indian reservations. Accordingly, the decision of the Court of Appeals of Arizona should be affirmed.

ARGUMENT

I. EXPRESS CONGRESSIONAL AUTHORIZATION NOT ESSENTIAL FOR VALIDITY OF STATE ACTION

From the recent decisions in Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d

251 (1959); Organized Village of Kake v. Egan, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962) and Kennerly v. District Court of Montana, 440 U.S. 423, 91 S.Ct. 480, 27 L.Ed.2d 507 (1971), it is now established that the rule for determining validity of state action in respect to Indian reservations is whether the action is prohibited by a governing act of Congress or infringes upon the Indian right of self government. This test clearly indicates that there is a residual state jurisdiction. This residual state jurisdiction is not authorized by act of Congress. It exists by reason of statehood. Because of this state jurisdiction Enabling Act provisions of some states reserved sufficient powers to Congress to enable it to take appropriate action in the future in respect to matters of concern to

the federal government such as the proprietary interest of the Indians in Indian land.

From the case law and legislative history, it is evident that this rule for determining validity of state action completely states the limitations on state action in respect to Indian reservations. It was undoubtedly because congressional authorization of state action was not required by the Act of June 20, 1910, 36 U.S. Stat. 557, provided in Section 20 thereof that the lands owned by Indian tribes would remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States. If express congressional authorization had been a requirement, such a provision would have been completely superfluous.

Numerous acts of Congress prohibit

state taxation in respect to Indian reservations and nearly as many statutes authorize state taxation. 1/ Statutes authorizing state taxation were necessary because the property was formerly exempted from taxation by state enabling acts or because it was United States property or property of an instrumentality of the United States. This statutory pattern of prohibiting state taxation in specific situations and authorizing state taxation where it was previously pro-

---

1/ The following sections of Title 25 prohibit state taxation: 86 (1914), 233 (1950), 348 (1887), 409a (1931), 412a (1936), 465 (1934), 564c (1958), 416i (1966), 487c (1970), 492 (1970), 355 (1918). The following sections of Title 25 authorize state taxation: 349 (1887), 379 (1902), 398 (1929), 399 (1919), 401 (1924), 501 (1936), 608 (1964), 674 (1953), 610b (1968) and 645 (1970).

hibited by statute or judicial decision indicates that during the past seventy years congressional authorization of state taxation was not required.

Whenever, upon the admission of a state into the Union, Congress intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869 (1882). An example of a case in which Indian lands were excluded from the jurisdiction of the state by treaty and by the subsequent act of Congress admitting that state to the Union is Kansas Indians, 5 Wall. 737. More recent decisions indicating congressional authorization of state action is not required are New York v. Martin, 326 U.S. 496, 90 L.Ed. 261 (1946),

indicated by statute or judicial decision indicates that during the past seventy years congressional authorization of state taxation was not required.

Whenever, upon the admission of a state into the Union, Congress intended to except part of it as an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. United States v. McGowney, 104 U.S. 521, 14 L.Ed. 869 (1882). An example of a case in which Indian lands were excluded from the jurisdiction of the state by treaty and by the subsequent act of Congress admitting that state to the Union is Kansas Indians, 5 Wall. 737. More recent decisions indicating congressional authorization of state action is not required are New York v. Martin, 326 U.S. 496, 90 L.Ed. 261 (1946),

in which the Court held that in the absence of a limiting treaty obligation or congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries and Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965), in which the Court held that Arizona could not impose its transaction privilege tax on sales by licensed Indian traders to Indians because Congress had preempted the regulation of Indian trading on reservations. If congressional authorization of state taxation was required, it would not have been necessary for the Court to have decided the Warren Trading Post case on the ground of congressional preemption of the field.

Indian reservations constitute a sub-

stantial portion of the area of some states. If Congress had intended that congressional authorization was required in order for states to impose taxes on Indian reservations there would certainly have been some express language in some act of Congress that expressly provided for such an important limitation on the states. In rejecting an exclusive federal legislative authority argument in Silas Mason Company v. Tax Commission, 302 U.S. 186, 82 L.Ed. 187 (1937), the Court observed that while title to these Indian lands had always been in the United States, the state had never ceded exclusive legislative authority to the United States. The Washington Enabling Act provisions are like those of Arizona. Neither the Arizona Enabling Act, 36 U.S. Stat. 557, nor the general pattern of the congressional acts

pertaining to taxation of Indian lands, nor the case law indicates that such a limitation on state taxing power exists.

II. IMPOSITION OF ARIZONA INCOME TAX DOES NOT IMPAIR ANY RIGHTS GRANTED OR RESERVED BY FEDERAL LAW

The Act of June 20, 1910, 36 U.S. Stat. 557, which provided for the admission of Arizona to the Union contained provisions in Section 20 that the people of the proposed state forever disclaim all right and title to all lands lying within the boundaries of the state owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribe shall have been extinguished the same shall be and remain sub-

ject to the disposition and under the absolute jurisdiction and control of the United States. It is apparent from the context of the above provisions that the disclaimer and the absolute jurisdiction and control of the United States Congress both relate to the proprietary interest in the land of the Indian tribes.

The same paragraph of the Enabling Act also prohibits the United States from taxing such lands. If the words "absolute jurisdiction and control" were not used in such a limited sense, then the provision relating to taxes would be superfluous. It wouldn't be necessary to prohibit the imposition of state property taxes if the state had no jurisdiction. The fact that the prohibition is limited to property taxes clearly implies that the state does have the power

to impose other taxes.

The limited scope of these Enabling Act provisions is further indicated by several cases. In Draper v. United States, 164 U.S. 240, 17 S.Ct.Rptr 107 (1896), the Court had occasion to consider the meaning of the "absolute jurisdiction and control" provision of the Montana Enabling Act, 25 Stat. 676. The Court concluded that this restrictive language was used because it was necessary in order to prevent any implication of state power to frustrate limitations imposed by the laws of the United States upon title to Indian lands which had become extinct by allotment in severalty. Thus, the Court rejected the argument that this language provided for exclusive jurisdiction in the federal government.

The meaning of this "absolute jurisdic-

to impose other taxes.

The limited scope of these Enabling Acts provisions is further indicated by several cases. In Brady v. United States, 24 U.S. 248, 27 Sct.Rptr 187 (1907), the Court had occasion to consider the meaning of the "absolute jurisdiction and control" provision of the Montana Enabling Act, 25 Stat. 676. The Court concluded that this restrictive language was used because it was necessary in order to prevent any implication of state power to frustrate limitations imposed by the laws of the United States upon title to Indian lands which had been extinguished by allotment in severalty. Thus, the Court rejected the argument that this language provided for exclusive jurisdiction in the federal government.

The meaning of this "absolute jurisdic-

tion and control" provision in the Arizona Enabling Act was considered in Porter v. Hall, 34 Ariz. 308, 321, 271 P. 411 (1928), and the court there concluded that this language applies to Indian lands considered as property and not as a territorial area withdrawn from the sovereignty of the State of Arizona. The meaning of the words "absolute jurisdiction and control" in the Alaska Enabling Act, 72 Stat. 339, was considered in Organized Village of Kake v. Egan supra, and the Court concluded that these words did not mean exclusive jurisdiction.

The same provisions of the North Dakota Enabling Act, 25 Stat. 676, were construed in Vermillion v. Spotted Elk, 85 N.W.2d 432 (1957), and the court held that the reservation of jurisdiction applied only to rights of Indians in their lands and that the pur-

pose of the disclaimer was to safeguard the interest of the Indians in their allotments. The court had occasion to consider the meaning of the disclaimer provision of the New Mexico Enabling Act, 36 Stat. 557, in Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002 (1969), and concluded that the disclaimer was a disclaimer of proprietary rather than governmental interest. In Organized Village of Kake v. Egan, supra, the Court concluded that the disclaimer provision in the Alaska Enabling Act, 72 Stat. 339, was a disclaimer of proprietary interest.

The limited meaning of the disclaimer and "absolute jurisdiction and control" provisions of the Enabling Acts is indicated by the Court's observation in Surplus Trading Co. v. Cook, 281 U.S. 647, 50 S.Ct. 455 (1929), that state laws have the same force

on Indian reservations as elsewhere within state limits except that they can only have restricted application to the Indian wards. Because of the residual nature of the state's jurisdiction on Indian reservations, state laws can only have limited application to Indians. As the cases previously cited herein indicate, state laws cannot apply if a governing law of Congress is applicable or if the application of state laws would interfere with the Indian right of self government. These cases indicate that state enabling act limitations such as those of the State of Arizona do not prohibit the application of a state income tax to Indian residents of an Indian reservation.

In 1953 Congress was advised by the then Assistant Secretary of the Interior in a letter dated July 7, 1953 to The Honorable

A. L. Miller, Chairman of the Committee on Interior and Insular Affairs, House of Representatives, that state enabling acts of certain states required the people of the proposed states to include provisions in their Constitution disclaiming jurisdiction over Indian lands and providing that until the Indian title was extinguished the lands were to remain under the absolute jurisdiction and control of Congress and that as a consequence of these enabling acts and constitutional provisions, Congress would have to give its consent and the people of such states would have to amend their Constitution before such states could legally assume jurisdiction over Indian reservations. 1953 U.S. Code Congressional and Administrative News, 2414.

It did not appear from the Committee

A. L. Miller, Chairman of the Committee on Territories and Insular Affairs, House of Representatives, that state enabling acts of certain states required the people of the proposed states to include provisions in their Constitution disclaiming jurisdiction over Indian lands and providing that until the Indian title was extinguished the lands were to remain under the absolute jurisdiction and control of Congress and that as a consequence of those enabling acts and constitutional provisions, Congress would have to give its consent and the people of each states would have to amend their Constitutions before such states could legally assume jurisdiction over Indian reservations. - 1953 U.S. Code Congressional and Administrative News, 2414.

It did not appear from the Committee

reports that Congress was aware that the Assistant Secretary of the Interior's view of the enabling act provisions ascribed a much broader meaning to those provisions than was originally intended by the congressmen who enacted them out of a concern for protecting the proprietary interest of the Indians in their land and making certain that the United States had sufficient power to legislate in respect to its interests. Shortly after receipt of the Assistant Secretary's letter, Congress enacted legislation providing for consent of the United States to acquisition of state jurisdiction. 67 Stat. 588, Ch. 505, §§ 6 and 7.

The two coordinate aims of this legislation were (1) withdrawal of federal responsibility for Indian affairs wherever practicable and (2) termination of the objec-

tion of Indians to federal laws applicable to Indians as such. H.R. Rep. No. 848, 83d Cong., 1st Sess. 1953 U.S. Code Congressional and Administrative News, 2409. Thus, the legislators considered this legislation was necessary for the purpose of termination of federal responsibilities in respect to Indian reservations rather than for the purpose of federal preemption of jurisdiction over the reservations. This narrow purpose of P.L. 280, Act of August 15, 1953, 67 Stat. 588, was recognized in Vermillion v. Spotted Elk, (North Dakota) supra, and Ghahate v. Bureau of Revenue, supra. As the Court noted in the Ghahate case, the fact that New Mexico had not assumed jurisdiction over reservation Indians did not indicate any withdrawal or loss of the jurisdiction recognized in Organized Village of

Kake v. Egan, supra, and Williams v. Lee, supra.

Under the Indian Civil Rights Act of 1968, 25 U.S. Code 1324, 82 Stat. 79, and 25 U.S. Code 1326, 82 Stat. 80, a procedure was provided by which any states with enabling act and constitutional impediments to assumption of civil and criminal jurisdiction might remove such impediments by amendment of their constitution and statutes provided that state jurisdiction with respect to criminal offenses or civil causes of action would be applicable in Indian country only where a majority of the Indians voted to accept such jurisdiction. These provisions of the Indian Civil Rights Act merely amended P.L. 280 to add a requirement for Indian approval of state assumption of jurisdiction with respect to criminal of-

Ryan, supra, and Williams v. Lee,
supra.

Under the Indian Civil Rights Act of
1968, 25 U.S. Code 1324, 82 Stat. 79, and
25 U.S. Code 1326, 82 Stat. 80, a procedure
was provided by which any states with en-
abling act and constitutional impediments
to assumption of civil and criminal juris-
diction might remove such impediments by
amendment of their constitution and statutes
provided that state jurisdiction with res-
pect to criminal offenses or civil causes
of action would be applicable in Indian
country only where a majority of the Indi ns
voted to accept such jurisdiction. These
provisions of the Indian Civil Rights Act
merely amended P.L. 280 to add a requirement
for Indian approval of state assumption of
jurisdiction with respect to criminal of-

fenses or civil causes of action.

The decision in Kennerly v. District Court of Montana, supra, is not controlling in this case because the question presented to the Court there was solely a question of the procedures by which the tribal consent was obtained under the Indian Civil Rights Act and the Court did not have occasion to go into the question of the scope of the Indian Civil Rights Act and residual state jurisdiction. Furthermore, the case only involved a question of jurisdiction of the courts rather than the question of general governmental jurisdiction. In view of the limited purpose of P.L. 280 and the Indian Civil Rights Act to provide a procedure for removing enabling act and state constitutional impediments to state jurisdiction, those laws do not bar the imposition of a

issues or civil causes of action.

The decision in Kennedy v. District Court of Montana, supra, is not controlling in this case because the question presented to the Court there was solely a question of the procedures by which the tribal consent was obtained under the Indian Civil Rights Act and the Court did not have occasion to go into the question of the scope of the Indian Civil Rights Act and residual state jurisdiction. Furthermore, the case only involved a question of jurisdiction of the courts rather than the question of general governmental jurisdiction. In view of the limited purpose of P.L. 280 and the Indian Civil Rights Act to provide a procedure for securing enabling act and state constitutional impediments to state jurisdiction, these laws do not bar the imposition of a

state income tax on incomes of Indian residents of an Indian reservation.

The appellant has contended that the Buck Act, 54 Stat. 1059 (1940), reenacted and codified as 4 U.S. Code 105-110 (1947), is an Act of Congress which governs this case. 4 U.S. Code 109 provides:

> 109 Same. Exception of Indians
>
> Nothing in §§ 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indians not otherwise taxed.

It was never intended that the Buck Act should apply to Indian reservations and the above quoted language was inserted after the objections had been made by the Acting Secretary of the Interior for the express purpose of maintaining the status quo in respect to Indian reservations. 84 CONG. REC. 10685 (1939). In Warren Trading Post v.

Arizona Tax Commission, supra, the Court agreed that this legislation did not apply to Indians. It cannot seriously be argued that legislation which has no application constitutes a restriction of state taxing power. From the foregoing analysis, it is evident that no act of Congress prohibits the State of Arizona from imposing its income tax on the income of Indians residing on an Indian reservation within the State and that imposition of the tax does not impair any right granted under any act of Congress.

III. IMPOSITION OF ARIZONA INCOME TAXES DOES NOT INFRINGE UPON INDIAN RIGHT OF SELF GOVERNMENT

Cases involving state and federal relations effectively define the right of self government. These cases clearly indicate that the imposition of Arizona's income tax

on Navajo residents of the servation would not violate the right of self government of the Navajo Tribe. States have been permitted to tax employees of the federal government on the theory that such taxation by the state does not constitute an undue interference with the governmental activities of the federal government. Graves v. New York, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927 (1938). In Sims v. United States, 359 U.S. 108, 79 S.Ct. 641, 3 L.Ed.2d 667 (1959), the Court upheld an Invernal Revenue Service levy on the salary of an employee of the State of West Virginia. The levy was directed to the State. Certainly the Navajo Tribe does not stand on a higher plane in respect to the question of self government than the state and federal governments. If states can impose income taxes on federal employees, they

certainly don't violate the right of self government of Indian tribes by imposing income taxes on members of Indian tribes residing within the state.

Indians are subject to payment of federal income taxes as are other citizens, unless an exemption from taxation can be found in the language of a treaty or an act of Congress. Commissioner of Internal Revenue v. Walker, 326 F.2d 261 (9th Cir. 1964). If it doesn't violate the tribal right of self government for the federal government to impose an income tax on Indians, it certainly doesn't violate the right of self government for the state to impose such a tax.

Imposition of the Arizona income tax on residents of the Navajo Indian Reservation doesn't violate any provision of the Treaty with the Navajo Indians of June 1, 1868,

15 Stat. 667. Imposing a personal income tax on residents of the reservation doesn't impose any burden on the Navajo tribal government. Accordingly, by all of the standards by which this question of infringement on the right of self government has traditionally been considered, imposition of this tax under the circumstances of this case on Indian residents of the Navajo Reservation doesn't infringe on the Navajo right of self government.

IV. INDIAN RESIDENTS OF NAVAJO RESERVATION ARE SUBJECT TO STATE INCOME TAX

Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes. When Congress wants to require non-taxability it

can, as it has so often done, say so explicitly. Oklahoma Tax Comm'n v. United States, 319 U.S. 598, 87 L.Ed. 1612 (1943). Treaties and statutes relating to the rights of Indians should be liberally construed in their favor. However, such principle comes into play only if such statute or treaty contains language which can reasonably be construed to confer income exemptions. Holt v. Comm'r of Int. Rev., 364 F.2d 38 (1966). As the preceding portions of this brief have pointed out, there is no treaty or statute which contains language that can reasonably be construed to confer state income tax exemptions on the members of the Navajo Tribe residing on the Navajo Reservation.

Indians are subject to the payment of income taxes as are other citizens. Squire v. Capoeman, 351 U.S. 1, 76 S.Ct. 611, 100

L.Ed. 883 (1956). Squire v. Capoeman is distinguishable from this case because the Court held capital gains from the sale of timber to be exempt from taxation under the General Allotment Act of 1887, 24 Stat. 388, 25 U.S. Code 331, et seq. This case involves income from personal services rather than property and the General Allotment Act has no application to this case. Imposition of state income taxes on Indians has been upheld in Leahy v. State Treas'r of Oklahoma, 297 U.S. 420, 56 S.Ct. 507, 80 L.Ed. 771 (1936); State Tax Comm'n v. W. L. Barnes, 178 N.Y.Supp.2d 932 (1958); Powless v. State Tax Comm'n, 253 N.Y.Supp.2d 438 (1964), and Ghahate v. Bureau of Revenue, supra. The only case that our research disclosed holding a state could not impose an income tax on Indian residents of an Indian reservation

is Comm'r of Taxation v. Brun, (Minn.) 147 N.W.2d 120 (1970).

In the Brun case the court based its decision on the grounds that the state did not have jurisdiction and that payment of the taxes would interfere with the tribal right of self government. Our arguments against the Minnesota court's position are set out in the earlier portions of the brief pertaining to applicable federal legislation and infringement on the right of self government. The Minnesota court was of the view that the economic impact on the individual tribal member constituted interference with the right of tribal self government. Other services besides governmental services have an economic impact and yet this sovereignty argument is not considered a defense to liability for such services. The court also

[illegible] Department of Taxation v. Mann, (Minn.) 147
[illegible] 2d 120 (1967).

In the Bryan case the court based its
[illegible]sion on the grounds that the state did
[illegible] have jurisdiction and that payment of
[illegible] taxes would interfere with the tribal
[illegible]se of self government. Our arguments
[illegible]gainst the Minnesota court's position are
[illegible] set out in the earlier portions of the brief
[illegible] pertaining to applicable federal legislation
[illegible] and infringement on the right of self govern-
[illegible]ment. The Minnesota court was of the view
[illegible] that the economic impact on the individual
[illegible] tribal member constituted interference with
[illegible] the right of tribal self government. Other
[illegible] services besides governmental services have
[illegible] economic impact and yet this sovereignty
[illegible]argument is not considered a defense to
[illegible]liability for such services. The court also

noted that Minnesota had not established that it provided benefits to these Indians and, therefore, it had no reason to impose any taxes.

As the Arizona Court of Appeals pointed out in McClanahan v. State Tax Comm'n, 14 Ariz.App. 452, 456, 484 P.2d 221 (1971), counsel for the appellant conceded during oral argument that monies of the State of Arizona were expended for education and welfare within the confines of the Navajo Reservation and the Navajo Indians were the beneficiaries of these expenditures. It appeared that the Minnesota court merely assumed that the economic impact on individual tribe members would affect the tribal right of self government. However, if the Minnesota court was really convinced that Minnesota did not have jurisdiction, it

would not have had to consider the question of whether the tax infringed on the tribal right of self government.

In Leahy v. State Treas'r of Oklahoma, supra, the Court noted that federal income taxes had been upheld in respect to the same type of income and concluded that since Leahy was entitled to the income and free to use it as he saw fit, there was no reason why such income should not also be taxable by the state. Thus, the decisions of the state and federal courts, with the exception of the Brun case, supra, indicate that income of Indians such as that in issue in this case is subject to state income taxation.

V. SOME RAMIFICATIONS OF APPELLANT'S POSITION

There are some fundamental contradictions between the appellant's claim that

states have only been allowed jurisdiction on Indian reservations pursuant to express congressional enactment and what has actually happened on the Navajo Reservation. It can hardly be disputed that Arizona laws apply on the Navajo Reservation for the purpose of conferring all kinds of rights, privileges and benefits on the Indian residents of the reservation.

Reservation Indians have the right to vote, Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948); the right to serve on a jury, Denison v. State, 34 Ariz. 144, 268 P. 617 (1928); and a practically guaranteed representation in the Arizona House of Representatives and Legislature, Klahr v. Williams, 339 F.Supp. 922 (1972). When states attempt to withhold benefits from Indian reservations, they are forced to pro-

tates have only been allowed jurisdiction
n Indian reservations pursuant to express
ongressional enactment and what has actually
happened on the Navajo Reservation. It can
early be disputed that Arizona laws apply
n the Navajo Reservation for the purpose
f conferring all kinds of rights, privileges
nd benefits on the Indian residents of the
eservation.

Reservation Indians have the right to
ote. Harrison v. Laveen, 67 Ariz. 337, 196
.2d 456 (1948); the right to serve on a
ury. Denison v. State, 4 Ariz. 144, 269
. 617 (1928); and a practically guaranteed
epresentation in the Arizona House of Rep-
esentatives and Legislature. Klahr v.
illiams, 339 F.Supp. 927 (1972). When
tates attempt to withhold benefits from
ndian reservations, they are forced to pro-

vide those benefits on the basis of the claim that failure to do so would constitute a denial of equal protection of the laws. Begay v. Sawtelle, 53 Ariz. 304, 88 P.2d 999 (1939); Bradley v. Arizona Corp. Comm'n, 60 Ariz. 508, 141 P.2d 524 (1943); State Bd. of Public Welfare v. Bd. of Comm'rs, 262 N.C. 475, 137 S.E.2d 801 (1964).

Thus, we see that Indians participate in the government of the State of Arizona and as counsel conceded in the oral argument in the Arizona Court of Appeals receive economic benefits from the State of Arizona. Now, does the appellant contend that the State of Arizona has no power to permit Indian participation in Arizona government and provide these benefits or is it their contention that the Indian residents of the reservation must receive all the benefits

of state citizenship, but none of the burdens of such citizenship can be imposed on them?

Many people in Arizona living off the Indian reservations are in modest and poor circumstances. It would certainly be a denial of the equal protection of the laws to exempt from all taxation a group that is sufficiently numerous to have its own representation in the Legislature while taxing other people who are equally poor additional amounts in order to pay for the governmental benefits of the reservation Indians. Since Brown v. Bd. of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), a pragmatic approach has been taken to equal protection questions. The appellant argues in favor of a system that would be grossly unequal and unreasonable.

In its amicus curiae brief the Solicitor

General refers to the vast amounts spent on the Navajo Reservation by the United States Government. We don't know how these amounts compare with those spent by the State of Arizona and we don't think the tax liability question turns on which government spends the most, but the figures point out one of the problems of Arizona's responsibilities. Budget items are frequently increased, decreased and eliminated without any changes in the general laws. When decreases or elimination of some of these items occur, the State of Arizona has the responsibility for supplying the essential services that are required. Since the Navajo Reservation is located in the State of Arizona, this State has the ultimate responsibility. This problem is further aggravated by the fact that the State of Arizona has an extremely narrow

tax base because most of the land in Arizona is owned by the United States and, thus, is not subject to taxation.

If, as the appellant apparently contends the residents of Indian reservations were a privileged class who have all of the rights, privileges and benefits of state government and none of its burdens, it would be entirely feasible for residents of Indian reservations located close to the metropolitan areas of Tucson and Phoenix to capitalize on the fact that they were operating out of an advantageously located island of tax immunity by selling cigarettes, other items on which there are high state excise taxes and large sales tax items such as automobiles and appliances at prices that would mean ruinous competition for those engaged in such businesses in the adjacent metropolitan

areas. Nothing cited by the appellant in any treaty or act of Congress including legislation to provide economic assistance to reservation Indians indicates that Congress ever intended to provide for such a result and self-determination of the Indian tribes certainly doesn't require this kind of over-protection to the extreme detriment of others.

CONCLUSION

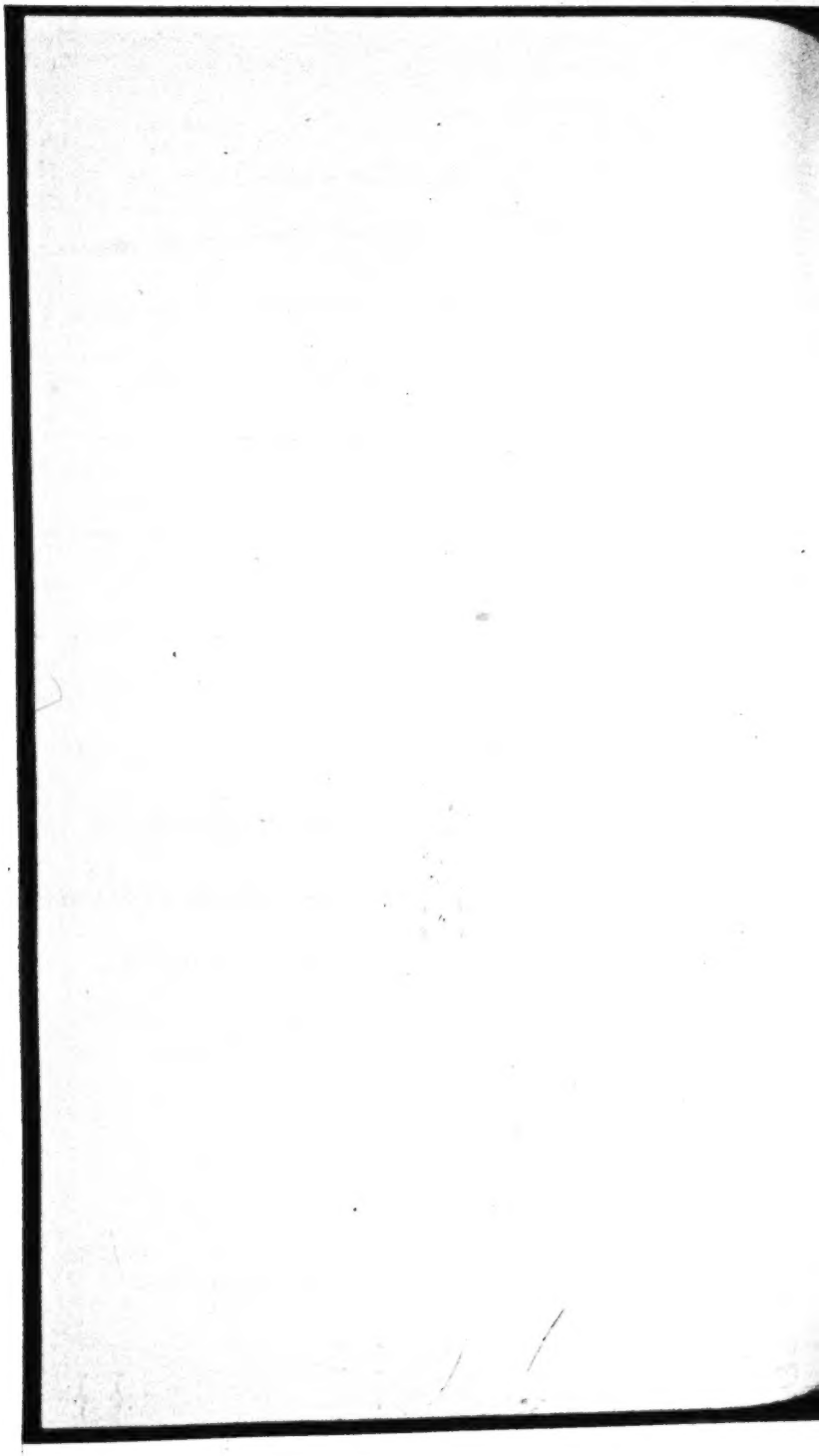
Because of the logical, equitable and legal reasons set out above, the judgment of the Arizona Court of Appeals should be affirmed.

Respectfully submitted,

GARY K. NELSON
The Attorney General
of Arizona

JAMES D. WINTER
Assistant Attorney General
Attorneys for Appellee

July, 1972.



AUG 25 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-834

ROSALIND McCLANAHAN, on behalf of herself and all others similarly situated,

Appellant,

vs.

ARIZONA STATE TAX COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF OF MONTANA INTER-TRIBAL POLICY BOARD AS *AMICUS CURIAE*

SAMUEL W. MURPHY, JR.
Two Wall Street
New York, New York
Attorney for Amicus Curiae

DONOVAN LEISURE NEWTON & IRVINE
WILLIAM C. PELSTER
JAMES A. HENNEFER
Of Counsel

TABLE OF CONTENTS

PAGE

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. State taxation of members of self-governing Indian Tribes is precluded by the aboriginal sovereignty of those tribes where such sovereignty is recognized by treaty, not abandoned by the Indians, and not modified by act of Congress 4

II. Due process of the law prevents states from levying taxes upon Indians for whom it has only minimal governmental responsibilities 15

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Arizona ex rel. Merrill v. *Turtle,* 413 F.2d 683 (9th Cir. 1969) 7

Buster v. *Wright,* 135 F. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906) 4, 12

Confederated Salish and Kootenai Tribes v. *State of Montana* (Civ. No. 2157 D.C. Mont.) 3

PAGE

Day v. *State of Montana*, No. 35818 (1st Judicial District, Lewis & Clark County) 3

Ex Parte Crow Dog, 109 U.S. 556 (1883) 7

General Motors v. *Washington*, 377 U.S. 436 (1964) 17

International Harvester Co. v. *Dep't of Taxation*, 322 U.S. 435 (1943) 17

Kennerly v. *District Court of Montana*, 400 U.S. 423 (1971) 3, 11, 14

Leahy v. *State Treasurer of Oklahoma*, 297 U.S. 420 (1936) 8

Lone Wolf v. *Hitchcock*, 187 U.S. 553 (1903) 7

McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 13-14

Metlakatla Indian Community v. *Egan*, 369 U.S. 45 (1962) 2, 8, 9

National Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753 (1967) 17

Native American Church v. *Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959) 5

Northwestern States Portland Cement Company v. *Minnesota*, 358 U.S. 450 (1959) 17

Oklahoma Tax Commission v. *United States*, 319 U.S. 598 (1943) 8, 15-16

Organized Village of Kake v. *Egan*, 369 U.S. 60 (1962) 2, 9, 10

PAGE

Porto Rico Telephone Co. v. *Descartes*, 255 F.2d 169 (1st Cir. 1958) 17

State ex rel. McDonald v. *District Court*, —— Mont. ——, 496 P.2d 78 (1972) 3

The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866) 8, 9

United States v. *Kagama*, 118 U.S. 375 (1886) 5, 7, 12

Warren Trading Post v. *Arizona Tax Commission*, 380 U.S. 685 (1965) 15

Williams v. *Lee*, 358 U.S. 217 (1959) 5, 6, 7, 9, 12, 14, 18

Wisconsin v. *J. C. Penney Co.*, 311 U.S. 435 (1940) 16-17

Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) 4, 5-6, 7, 9, 12

Constitution and Statutes

U.S. CONST. Art. I, § 8, cl. 3 7

U.S. CONST. Art. I, § 10, cl. 1 6

U.S. CONST. Art. II, § 2, cl. 1 6

U.S. CONST. Art. VI, cl. 2 ..... 6, 7

U.S. CONST. amend. XIV, § 2 ..... 3, 16

25 C.F.R. § 33.4 17

15 Stat. 649 (1868) 2

15 Stat. 667 (1868) 2, 4

36 Stat. 557 (1910) 10

43 Stat. 253, *as amended*, 8 U.S.C. § 1401(a)(2) 16

67 Stat. 588 (1953) 11

67 Stat. 590 (1953), *repealed by* 25 U.S.C. § 1323 ..... 13, 18

4 U.S.C. §§ 105-110 11

PAGE

18 U.S.C. § 1161 10
20 U.S.C. §§ 631 *et seq.* 17
25 U.S.C. § 231 10
25 U.S.C. § 318(a) 17
25 U.S.C. § 398 10
25 U.S.C. § 452 17
25 U.S.C. §§ 461-479 ..... 13, 14
25 U.S.C. § 476 2
25 U.S.C. § 639 17
25 U.S.C. §§ 1321-1326 13
42 U.S.C. § 2002 17

Other Authorities

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942) (U. New Mexico Press reprint 1971) 5, 12, 13, 16

Indian Taxation: Underlying Policies and Present Problems, 59 CALIF. L. REV. 1264 (1971) 5

Senate Concurrent Resolution 26, December 11, 1971 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-834

ROSALIND MCCLANAHAN, on behalf of herself and all others similarly situated,

Appellant,

vs.

ARIZONA STATE TAX COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF OF MONTANA INTER-TRIBAL POLICY BOARD AS *AMICUS CURIAE*

The Montana Inter-Tribal Policy Board, as *amicus curiae,* submits this brief on behalf of all Montana Indians. Appellant and Appellee have each given written consent to the filing of this brief, which consents have been filed with the Clerk of the Court.

Interest of *Amicus Curiae*

The Montana Inter-Tribal Policy Board represents approximately 27,000 Indians living in the State of Montana. About 20,000 Indians live on or near the seven Montana Indian reservations which contain the following Indian Tribes: Arapahoe, Assiniboine, Blackfeet, Chippewa, Cree,

Crow, Flathead, Gros Ventre, Northern Cheyenne, and Sioux.

Most of these tribes, like the Navajo Tribe of which Appellant Rosalind McClanahan is a member, have retained their customs, laws, and tribal government, are organized pursuant to the Indian Reorganization Act of 1934,[1] and are currently expanding their governmental functions. These Montana tribes provide their members with governmental administration and services, including: civil and criminal courts; health, education, and welfare programs; and capital improvements. These activities require that the tribes raise substantial revenue from their own limited financial resources and those of their members.

Arizona's assertion that it has power to tax the income of tribal Indians poses a direct threat to the viability of tribal self-government in Montana as well as in Arizona. The Montana Indian tribes have protective treaties with the federal government similar to those of the Navajos.[2] The enabling acts of Arizona and Montana have identical disclaimer provisions leaving Indian lands "under the absolute jurisdiction and control"[3] of the United States. A decision upholding Arizona's tax levy might authorize Montana to tax the income of many of the tribal Indians represented by the Montana Inter-Tribal Policy Board. Such taxation would effectively destroy the residual aboriginal right of these tribes to make and be governed by their own

---

[1] 25 U.S.C. § 476.

[2] See *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 52 (1962), which notes the similarity in crucial language of the Navajo Treaty of 1868 (15 Stat. 667) and the Montana Crow's Treaty of 1868 (15 Stat. 649).

[3] *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 68 (1962), notes this identical language.

laws, a result that contravenes the applicable treaties with the United States government and acts of Congress.[4]

The States of Montana and Arizona have only minimal responsibility for Indians. With only one minor exception,[5] neither state has the responsibility of civil or criminal jurisdiction over Indians on reservations within their borders. *Amicus Curiae* submits that when a state taxes the income of tribal Indians without assuming, either as a result of Congressional action or a decision by the Indians themselves, corresponding responsibilities for the well being of the tribes, such action is so arbitrary and unfair that it constitutes a violation of the due process rights guaranteed Indians by the Fourteenth Amendment to the United States Constitution.

Summary of Argument

I. State taxation of members of self-governing Indian tribes is precluded by the residual aboriginal sovereignty of those tribes where such sovereignty is recognized by treaty between the Indian tribes and the federal government, has not been relinquished by the Indian tribes, and has not been modified by act of Congress. The right of sovereignty of the Navajo Tribe of which Appellant is a

[4] There are presently two cases pending in Montana challenging the right of the state to collect personal income tax from Indians. One in state court, *Day* v. *State of Montana*, No. 35818 (1st Judicial District, Lewis & Clark County), and one in federal court, *Confederated Salish and Kootenai Tribes* v. *State of Montana*, Civ. No. 2157 (D. Mont.).

[5] The exception is Montana's exercise of criminal and some civil jurisdiction on the Flathead Reservation where some 80 per cent of the residents are non-Indians. See *State ex rel. McDonald* v. *District Court*, —— Mont. ——, 496 P.2d 78 (1972), and *Kennerly* v. *District Court of Montana*, 400 U.S. 423, 425 (1971).

member was guaranteed to it by the Navajo Treaty of 1868 (15 Stat. 667), and has never been relinquished or abandoned by the Tribe. Subsequent Congressional acts have not significantly modified the right to sovereignty guaranteed by this treaty. State taxation of the income of a tribe or its members severely jeopardizes the continued viability of this treaty-guaranteed sovereignty by draining off the meager resources available to finance tribal governmental functions.

II. Due process of the law prevents states from levying taxes upon citizens on behalf of whom it has accepted only minimal government responsibilities.

ARGUMENT

I.

State taxation of members of self-governing Indian tribes is precluded by the aboriginal sovereignty of those tribes where such sovereignty is recognized by treaty, not abandoned by the Indians, and not modified by act of Congress.

A. *Where the Aboriginal Internal Sovereignty Rights of Indian Tribes Are Protected by Treaty With the Federal Government, Such Rights May Be Modified Only by Congressional Act or by Consent of the Indians Themselves.*

As "Native Americans," Indian tribes enjoyed the aboriginal status of completely sovereign nations.[6] They re-

---

[6] *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832): "The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights . . . from time immemorial. . . ." See also *Buster* v. *Wright*, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

linquished their sovereignty to the federal government only to the extent provided by treaty. The scope of such relinquishment can be expanded only by subsequent act of Congress, or by the Indians' consensual abandonment of such rights. Federal treaties with the Indians recognized and protected the Indians' pre-existing internal tribal sovereignty,[7] and the Indian tribes that became parties to such treaties accordingly assumed the status of dependent, self-governing "nations."[8]

Thus, in the landmark decision of *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), Chief Justice Marshall stated of the "Cherokee Nation":

---

[7] See F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942) (U. New Mexico Press reprint 1971) 122 [hereinafter cited as COHEN]: "Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*" (Emphasis in original).

[8] *Worcester* v. *Georgia*, 31 U.S. at 559-60: "We have applied them [the words "treaty" and "nation"] to Indians, as we have applied them to other nations of the earth; they are applied to all in the same sense . . ." This was also the view of the Court of Appeals as to the Navajos in *Native American Church* v. *Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959): "But as declared in the decisions hereinbefore discussed [*Worcester* v. *Georgia*, *supra*; *United States* v. *Kagama*, 118 U.S. 375 (1886); *Williams* v. *Lee*, 358 U.S. 217 (1959)], Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States." See also, Comment: *Indian Taxation: Underlying Policies and Present Problems*, 59 CALIF. L. REV. 1261, 1264-66 (1971); and COHEN at 33-34: "That Treaties with Indian tribes are of the same dignity as treaties with foreign nations is a view that has been repeatedly confirmed by the federal courts and never successfully challenged."

> The Cherokee nation, then, is a distinct community, occupying its own territory, . . . in which the laws of Georgia can have no force . . .
>
> • • • • •
>
> [The Georgia laws asserting jurisdiction over a non-Indian in the Cherokee domain] interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union. They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognise the pre-existing power of the nation to govern itself.
>
> They are in hostility with the acts of Congress for regulating this intercourse, and giving effect to the treaties.[9]

The importance of this decision is its holding that the original treaty guaranties of tribal Indians' right to be self-governing are absolute—*beyond State control under the Constitution*[10]—unless Congress, by subsequent treaty,

---

[9] 31 U.S. at 561-562. The Treaty status of the Cherokee Nation and its relationship to the federal and state governments were held analogous to that of the Navajo Tribes in *Williams* v. *Lee*, 358 U.S. 217, 221-222 (1959).

[10] The Treaty power is contained in U.S. CONST. art. II, § 2, cl. 1. States are forbidden from entering into treaties by U.S. CONST. art. I, § 10, cl. 1. Federal treaties are binding on the states under U.S. CONST. art. VI, cl. 2: ". . . all Treaties made or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby . . ."

or statute under its plenary power over Indians,[11] revises these treaty obligations. These treaty rights were reaffirmed in *Williams* v. *Lee*, 358 U.S. 217 (1959), which held that Navajo sovereignty recognized by the Treaty of 1868 was "infringed" by allowing a non-Indian residing on the Reservation to bring suit against a member of the Navajo Tribe in the Arizona civil courts, rather than in the Navajo tribal courts. This Court stated:

> Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester* v. *Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. . . .
> . . . Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them it is for Congress to do it. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564-566.

358 U.S. at 221-23. Accord: *United States* v. *Kagama*, 118 U.S. 375 (1886); *Ex parte Crow Dog*, 109 U.S. 556 (1883); and *Arizona ex rel. Merrill* v. *Turtle*, 413 F.2d 683 (9th Cir. 1969).

A state cannot, therefore, unilaterally assume jurisdiction over a treaty-protected, sovereign Indian tribe, even where the state has extended some measure of rights and privileges to the tribe. Any state statute which conflicts with the federal treaty protection of the residual right to tribal sovereignty is void under the Supremacy Clause. (U.S. Const. art. VI, cl. 2.) State jurisdiction can be ob-

[11] Congress retains plenary power over the Indians under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3: "To regulate commerce . . . with the Indian Tribes." See *Williams* v. *Lee*, 355 U.S. 214, 219 n. 4 (1959).

tained only by alteration of the treaty, by the Indians' abandonment of the right to tribal self-government, or by act of Congress:

> Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and laws of Congress, and their property is withdrawn from operation of State laws.

The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1866).

B. *Indian Tribes Who Have Retained Their Tribal Organization and Government Have Not Abrogated Their Aboriginal Sovereignty So as to Permit the Exercise of State Jurisdiction.*

States are totally precluded from jurisdiction over Indians in any area where the Indians have retained their tribal sovereignty. Only where the right to tribal self-government has been abandoned by individual Indians or by a particular tribe and where the state has assumed full responsibility for such Indians may the state exercise jurisdiction over them.[12] Such was the case of the Oklahoma Indians in *Leahy* v. *State Treasurer of Oklahoma*, 297 U.S. 420 (1936), which sustained a state tax on an Indian's share of his tribe's mineral resource income, and in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943), which upheld application of the Oklahoma inheritance tax to the estate of an Indian. In *Oklahoma Tax Commission*,

---

[12] Even in these circumstances, such jurisdiction can be precluded by a controlling act of Congress. See *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45 (1962).

Justice Black, writing for the Court, discussed *Worcester* v. *Georgia* and its progeny and stated:

> The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester* v. *Georgia, supra;* and, unlike the Indians involved in *The Kansas Indians* case, *supra,* they are actually citizens of the State with little to distinguish them from all other citizens . . . . (319 U.S. at 603)

In *Organized Village of Kake* v. *Egan,* 369 U.S. 60 (1962), where state jurisdiction over Indians was sustained, there were facts showing that the Southeastern Alaskan Indians lacked the essential treaty-protected internal sovereignty: 1) the Indians had no formal treaty rights and no reservation; 2) Alaska had both civil and criminal jurisdiction over the Indians; and, as stated in the companion case of *Metlakatla Indian Community* v. *Egan,* 369 U.S. 45, 50-51 (1962), 3) these Indians had "substantially adopted and been adopted by the white man's civilization" and were not subject to "the principle of Indian national sovereignty enunciated in *Worcester* v. *Georgia.*"

Neither the Navajo Tribe nor the Montana tribes represented by *amicus curiae* have so abrogated their treaty rights to tribal sovereignty.

C. *Subsequent Acts of Congress Have Not Significantly Modified the Sovereignty Guaranteed to the Navajo and Montana Tribal Indians by Treaty.*

Since the Navajo Indians residing on their reservation have not consented to the Arizona income tax nor have they abandoned or relinquished their treaty-guaranteed

rights of sovereignty in this area, the question remains whether these rights have been modified by act of Congress.

Congress did not modify these rights when Arizona was admitted to the Union. The Arizona Enabling Act[13] provides in part that all lands owned or held by Indians or Indian Tribes "shall be and remain . . . under the absolute jurisdiction and control of the Congress of the United States." In *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 71 (1962), this Court examined identical language in the enabling act for the State of Alaska and interpreted it to mean that federal control, and hence treaty-protected residual Indian rights, were to remain "undiminished" following statehood.

Congress has occasionally employed its plenary power under the Commerce Clause to modify areas of traditional Indian tribal sovereignty and to extend to the states jurisdiction over Indian affairs. But without exception, such legislation has been specific and limited. For example, 25 U.S.C. § 398 represents a rare congressional authorization of state taxation of land or other property within the sphere of tribal government. That statute permitted the states to tax mineral leaseholds on unallotted Indian land, but the grant of jurisdiction was carefully limited to provide that "such tax shall not become a lien or charge of any kind or character against the property of the Indian owner."[14]

---

[13] 36 Stat. 557, 569 (1910).

[14] See also 25 U.S.C. § 231, allowing state health inspections and enforcement of compulsory school attendance laws on Indian land, the latter, however, only if the tribe consents; and 18 U.S.C. § 1161, permitting the application on Indian reservations, of state laws dealing with the sale and possession of intoxicants, again, only if there is consent of the tribe.

As a result of this legislative pattern, federal statutes allowing states to assume some form of civil or criminal jurisdiction over Indians have been strictly construed against the states. *Kennerly* v. *District Court of Montana*, 400 U.S. 423 (1971). In *Kennerly* this Court noted the specificity used when Congress granted to the states civil and criminal jurisdiction over Indians:

> The statute [Section 4 of the Act of August 15, 1953, 67 Stat. 588] is illustrative of the detailed regulatory scrutiny which Congress has traditionally brought to bear on the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian country. (400 U.S. at 424 n. 1.)

Congress has never expressly or impliedly granted states the power to tax the income of Indians residing on reservations. In fact, it has expressly legislated against the exercise of such authority. The Buck Act,[15] which allowed states to collect sales taxes, use taxes, and income taxes from residents of federal government lands, contains a specific exemption protecting the pre-existing immunity of Indians from all such taxes. The Act provides:

> Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed. (4 U.S.C. § 109.)

Thus, Congress has carefully avoided, even by implication, authorizing states to tax the income of reservation Indians.

---

[15] 4 U.S.C. §§ 105-110.

D. *The Continuing Viability of Tribal Sovereignty Would Be Severely Jeopardized by State Taxation of the Income of a Tribe or Its Members.*

Indian tribes are "distinct independent political communities,"[16] retaining all of the necessary powers for internal self-government derived from their aboriginal tribal sovereignty. These powers include, of course, the power to tax. *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), upheld a tax imposed by the Creek Tribe on non-Indian reservation traders. Speaking of the Tribe's power to exact such a levy, the Court of Appeals stated:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it. . . . [E]very original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by Act of Congress or by the contracts of the Creek tribe itself. (135 F. at 950)

Just as state civil and criminal laws cannot apply to Indians because the tribes retain the exclusive jurisdiction in such areas derived from their treaty-protected aboriginal rights,[17] state tax laws cannot apply to Indians or Indian

---

[16] *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

[17] *Williams* v. *Lee*, 335 U.S. 214, 218-222 (1959) (civil jurisdiction); *United States* v. *Kagama*, 118 U.S. 375 (1886) (criminal jurisdiction). See also COHEN at 146: "The principle that a state has no criminal jurisdiction over offenses involving Indians committed on an Indian reservation is too well established to require argument,

property subject to sovereign tribal tax powers. In this case, the Navajos have unquestioned civil and criminal jurisdiction on their reservation. Arizona did not undertake such jurisdiction although it might have done so at any time between 1953 and 1968 pursuant to Public Law 280.[18] Nor have the Navajos elected to allow Arizona to assume such jurisdiction under Title IV of the Civil Rights Act of 1968.[19]

The federal government has consistently pursued a policy designed to secure viable self-government for the Indians. Both the Indian Reorganization Act of 1934,[20] and Title IV of the Civil Rights Act of 1968[21] specifically provide for protection and development of the Indians' right to govern their own affairs. Congress has further declared:

> [O]ur national Indian policy shall give full recognition to and be predicated upon the unique relationship that exists between this group of citizens and the Federal Government . . .
>
> . . . [I]mproving the quality and quantity of social and economic development efforts for Indian people and maximizing opportunities for Indian control and self-determination shall be a major goal of our national Indian policy.

Senate Concurrent Resolution 26, December 11, 1971, 117 CONG. REC. 21325-26 (daily ed. Dec. 11, 1971).

---

attested as it is by a line of cases that reaches back to the earliest years of the republic. [citations omitted]." See generally, *Id.* at 145-149.

[18] Section 7 of Act of August 15, 1953, 67 Stat. 590, *repealed by* 25 U.S.C. § 1323.

[19] 25 U.S.C. §§ 1321-1322.

[20] 25 U.S.C. §§ 461-479.

[21] 25 U.S.C. §§ 1321-1326.

effective police force and court system which relieves Arizona of significant costs in the administration of justice within its borders. The Tribe also has its own anti-poverty office and welfare programs. Roads on the reservation are maintained by the Tribe and the Bureau of Indian Affairs. State schools which serve Indians are heavily subsidized by the federal government. See Appellant's Jurisdictional Statement, pp. 15-17.

The State of Arizona does not have civil or criminal jurisdiction over the Navajo Indians residing on the reservations within its borders. As this Court noted in *Williams* v. *Lee*, 358 U.S. 217, 223 (1959), Arizona's reason for failing to accept jurisdiction when it could have done so pursuant to Public Law 280,[27] is "possibly because the people of the State anticipate that the burdens accompanying such power might be considerable."

It is submitted that, just as a state may not constitutionally tax a foreign entity to which it furnishes only minimal services, it may not tax sovereign Indian tribes within its borders to whom it furnishes only minimal services without violating due process of law.

---

[27] Section 7 of Act of August 15, 1953, 67 Stat. 590, *repealed by*, 25 U.S.C. § 1323.

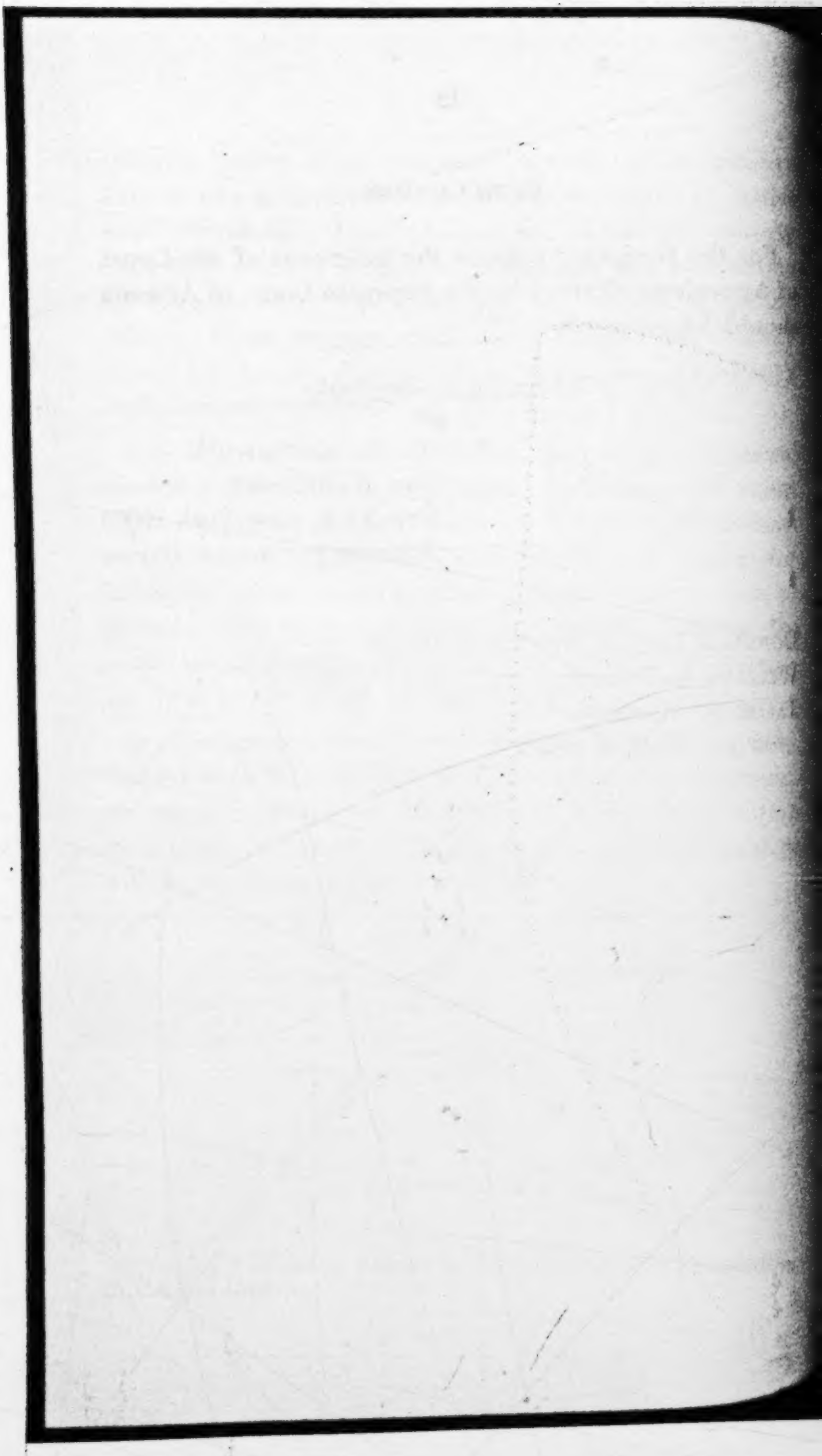
CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals as affirmed by the Supreme Court of Arizona should be reversed.

Respectfully submitted,

SAMUEL W. MURPHY, JR.
Two Wall Street
New York, New York 10005
Attorney for Amicus Curiae

DONOVAN LEISURE NEWTON & IRVINE
WILLIAM C. PELSTER
JAMES A. HENNEFER
Of Counsel



IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1971

Nos. 71-738, 71-834, 71-1031

...CALERO APACHE TRIBE, *Petitioner,*

v.

...KLIN JONES, COMMISSIONER OF THE BUREAU ... REVENUE OF THE STATE OF NEW MEXICO, and ... BUREAU OF REVENUE OF THE STATE OF ... MEXICO, *Respondents.*

...ALIND McCLANAHAN, on behalf of herself ... all others similarly situated, *Appellant,*

v.

...ONA STATE TAX COMMISSION, *Appellee.*

...ARD TONASKET, *Appellant,*

v.

... STATE OF WASHINGTON, *et al.*, *Appellees.*

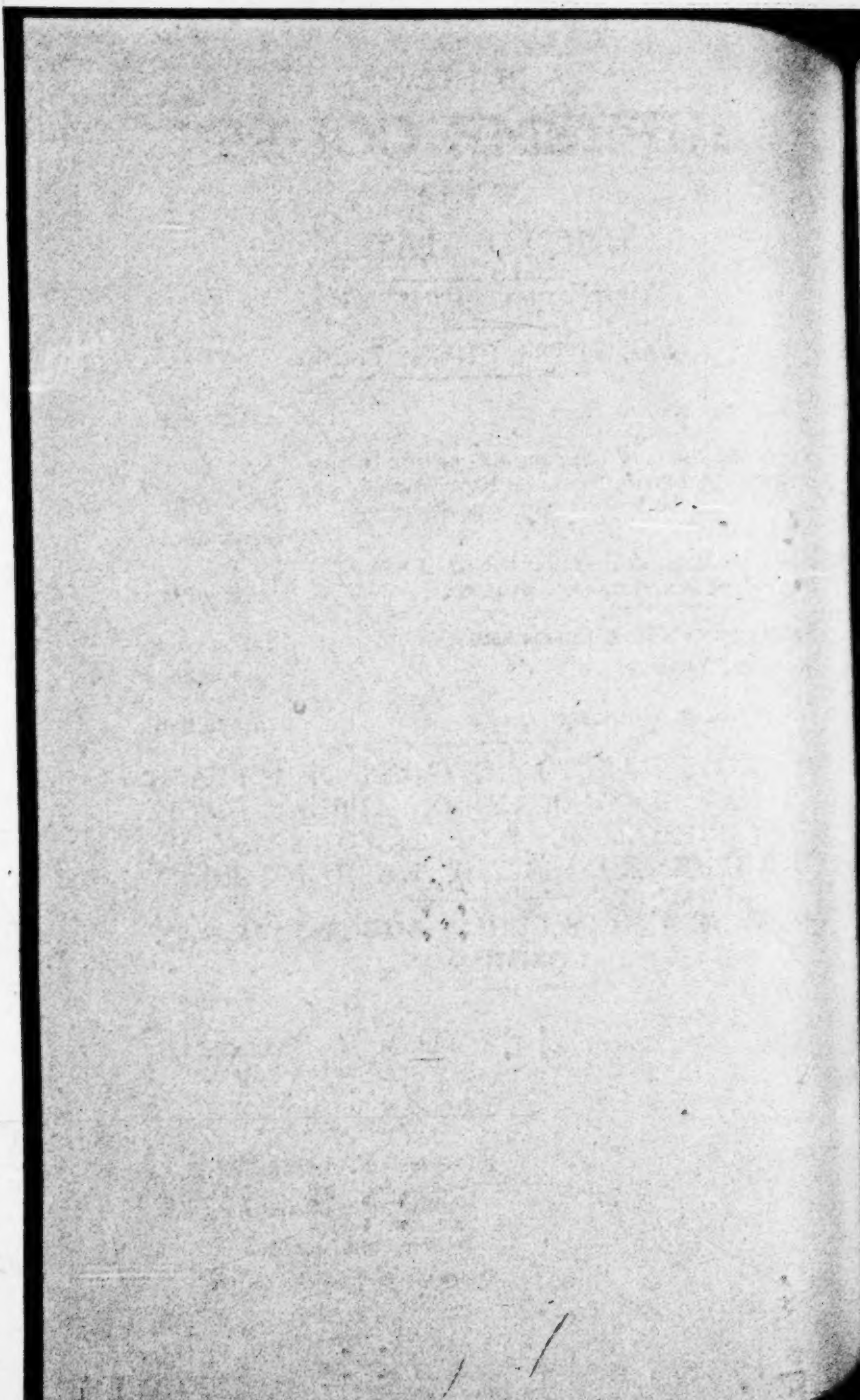
...CERTIORARI TO THE COURT OF APPEALS ...F NEW MEXICO, AND ON APPEAL FROM SUPREME COURT OF ARIZONA AND SUPREME COURT OF WASHINGTON

...EF OF AMICUS CURIAE MULTISTATE TAX COMMISSION

WILLIAM D. DEXTER,
Assistant Attorney General,
State of Washington,
Temple of Justice
Olympia, WA 98504

EUGENE F. CORRIGAN,
Counsel and Executive Director,
Multistate Tax Commission,
1909 - 26th Street
Boulder, Colorado 80303

Attorneys for Amicus Curiae.



INDEX

Page

STATEMENT OF INTEREST 1
STATEMENT OF FACTS 3
SUMMARY OF ARGUMENT 4
ARGUMENT 8
1. An Indian Reservation is Within the Territorial Jurisdiction of the State in Which it is Located 8
2. Imposition of the Taxes in the Instant Causes Is Not in Conflict With any Federal Statutes or Regulations Concerning the Individual Indians and the Indian Tribes in Question 11
3. The Principle of Implied Governmental Immunity Does Not Free the Appellants From the Taxes in Question 18
4. The Taxes Imposed in These Causes Do Not Conflict With the Indian Right of Self-Government 27
5. Squire v. Capoeman, 351 U.S. 1, 100 L ed 883 (1956) Does Not Preclude Application of the Taxes in the Instant Causes 29
CONCLUSION 31

TABLE OF CASES

Agua Caliente Band of Mission Indians v. County of Riverside, 442 F 2d 1184 (CCA 9th, 1971), cert. den. U.S. Supreme Court Feb. 22, 1972 7
Alabama v. King & Boozer, 314 U.S. 1, 86 L ed 3 (1941) ... 19
Choteau v. Burnet, 283 U.S. 691, 75 L ed 1353 (1931) 7, 23
Com'r of Int. Rev. v. Walker, 326 F 2d 261 (CCA 9th, 1964) 7
Curry v. United States, 314 U.S. 14, 86 L ed 9 (1941) 19
Draper v. United States, 164 U.S. 240, 41 L ed 419 (1896) .. 4
Esso Standard Oil v. Evans, 345 U.S. 495, 97 L ed 1174 (1953) 19
Five Civilized Tribes v. Com'r of Int. Rev., 295 U.S. 418, 79 L ed 1517 (1935) 7, 23, 24, 25
Graves v. New York, 306 U.S. 466, 83 L ed 927 (1939) 12, 19, 31
Helvering v. Mountain Producers Corp., 303 U.S. 376, 82 L ed 907 (1938) 7, 19, 20, 21, 23
James v. Dravo Contracting Co., 302 U.S. 134, 82 L ed 155 (1937) 19
Kansas Indians (Blue Jacket v. Johnson County) (U.S.), 5 Wall 737, 18 L ed 667 (1866) 8
Leahy v. State Treasurer of Oklahoma, 297 U.S. 420, 80 L ed 771 (1936) 7, 23, 24
McCurdy v. United States, 246 U.S. 263, 62 L ed 706 (1918) 7
Montana Catholic Missions v. Missoula County, 200 U.S. 118, 50 L ed 398 (1906) 5

As Chief Justice Marshall stated: "[T]he power of taxing the people and their property is essential to the very existence of government. . . ."[21] If the Indian self-government guaranteed by treaties and acts of Congress is to be a reality, Indians must have effective power to raise the revenue necessary to support governmental functions. The severe economic poverty on most Indian reservations, including the Navajo reservation, creates a meager tax base. To reduce this base still further by allowing state taxation of individual tribe members will seriously undercut the American Indians' efforts toward self-improvement and self-government. Such taxation would effectively destroy the "choice" of self-government offered the Indians by treaty and under the Indian Reorganization Act of 1934,[22] and would eviscerate the Indians' right to promulgate, administer, and enforce their own tribal civil and criminal laws recognized in Title IV of the Civil Rights Act of 1968.

State taxation of the income of individual Indians residing on reservations does, contrary to the holding of the Arizona Court of Appeals below, significantly interfere with the Indians' right to be self-governing. If, as recognized by this Court in *Williams* v. *Lee*, 358 U.S. 217 (1959), state assumption of jurisdiction over the personal debt of an *individual* Navajo can affect *tribal* sovereignty, it is clear that the asserted power to tax the income of all tribal Indians will have a more serious and direct impact on the ability of the Navajo Tribe to exercise its sovereign governmental functions. See also *Kennerly* v. *District Court of Montana*, 400 U.S. 423, 426-427 (1971).

---

[21] *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819).

[22] 25 U.S.C. §§ 461-479.

II.

Due process of the law prevents states from levying taxes upon Indians for whom it has only minimal governmental responsibilities.

Amicus Curiae believes that a state should not have jurisdiction to tax Indians to whom it provides only minimal governmental services. The argument draws support from the proposition, discussed above, that where a tribe continues to govern its members and provide traditional governmental services to them, the states may not exercise conflicting jurisdiction. In *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 691 (1965), Justice Black compared in detail the nature of the governmental services provided to individual Indians by the State and by the tribe with the assistance of the federal government, concluding:

> [S]ince federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.

Even where a state's power to tax Indians has been sustained, as in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1942), this Court has stressed that the nature and quantity of governmental services received by Indians from the State, and the failure of the Indian tribes to provide such services, were critical factors in determining whether the State might "reasonably" levy a tax. Speaking of the Oklahoma Indians, Justice Black noted:

> Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other ben-

efits of an ordered society. Citizens of Oklahoma must pay for these benefits. (319 U.S. at 608-609)

A state's lack of power to tax the members of self-governing Indian tribes, such as the Navajo Tribe of Arizona and the several tribes of Montana, may be further demonstrated by analogy to a state's lack of power to tax a foreign entity. In the leading case of *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435 (1940), this Court noted that such power is subject to the due process requirements of the Fourteenth Amendment,[24] and that consequently due process requires that the power to tax bear some relation to the protection, services, and benefits conferred by the state upon the taxed entity.

> "Taxable event," "jurisdiction to tax," "business situs," "extraterritoriality," are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. *The simple but*

---

[24] Indians were made citizens of the United States for purposes of the Fourteenth Amendment by the Citizenship Act of 1924, 43 Stat. 253, *as amended*, 8 U.S.C. § 1401(a)(2) (1966):

> (a) the following shall be nationals and citizens of the United States at birth:
>
> • • • • •
>
> (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

See COHEN at 153, 179.

controlling question is whether the state has given anything for which it can ask return. (311 U.S. at 444) (Emphasis supplied.)

This test was reaffirmed as recently as 1967 in *National Bellas Hess, Inc.* v. *Dep't of Revenue,* 386 U.S. 753, 756 (1967). See also *General Motors Corp.* v. *Washington,* 377 U.S. 436, 441 (1964); *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 465 (1959); *International Harvester Co.* v. *Dep't of Taxation,* 322 U.S. 435, 442 (1943); and *Porto Rico Telephone Co.* v. *Descartes,* 255 F.2d 169, 175 (1st Cir. 1958).

In *National Bellas Hess, supra,* the State of Illinois was prohibited from imposing the duty of use tax collection and payment upon an out of state, mail-order seller. The minimal benefits provided by Illinois to the seller in that case, such as the use of banking and credit facilities and access to Illinois courts,[25] were not considered sufficient to justify the imposition of the tax on the foreign entity.

The services provided to the Navajos solely by the State of Arizona are minimal compared to those provided by the Navajos themselves, by the federal government, and by the State with all but complete reimbursement from the federal government.[26] The Navajos, like the Montana tribes, provide their own executive administration, police force, tribal courts—both civil and criminal, educational programs and health programs. The Navajo Tribe has an

[25] 386 U.S. at 762 (Fortas, J. dissenting).

[26] See *inter alia,* 20 U.S.C. §§ 631 *et seq.* (school aid in federally impacted area); 25 U.S.C. § 318(a) (Reservation roads); 25 U.S.C. § 452 (Educational, medical, social programs); 25 U.S.C. § 639 (welfare programs); 42 U.S.C. § 2002 (health service program); 25 C.F.R. § 33.4 (education).

The Multistate Tax Commission is the official administrative agency of the Multistate Tax Compact entered into by twenty-one states as full members, and by fifteen states as associate members.[1]

It is significant to the Multistate Tax Commission that the applicability of various state excises as pertains to Indians and the Indian tribal organizations both on and off the reservations and in reference to sales to both Indians and non-Indians be clarified by this court. In *Mescalero*, there is a question posed concerning the the excise tax status of business operations off the reservation, apparently conducted by an organized Indian tribe through a corporation organized by the tribe. *McClanahan* involves the application of an income tax to an Indian in her individual capacity as a resident of the state of Arizona residing on the Navajo reservation where she earns the income. *Tonasket* is concerned with cigarette sales primarily to non-Indians by an individual Indian on his allotted land on the Colville tribe reservation, jurisdiction over which has been conceded to the state of Washington.

Each of these cases poses serious tax problems for many of the Multistate Tax Commission members. Stretched to their ultimate conclusions, argu-

---

[1]The legislatures of 21 states have enacted the Multistate Tax Compact, thereby making those states regular members of the Commission. Those states are: Kansas, Washington, Texas, New Mexico, Illinois, Florida, Nevada, Oregon, Missouri, Nebraska, Arkansas, Idaho, Hawaii, Colorado, Wyoming, Utah, Montana, North Dakota, Michigan, Alaska and Indiana. One state, Alabama, has enacted the Compact subject to Congressional legislative consent. Pending enactment of such consent, Alabama is considered to be an associate member state. Fourteen other states are associate members at the request of the respective governors. Those states are: Arizona, California, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania, South Dakota, Tennessee, Virginia and West Virginia.

ments in these three cases against state tax jurisdiction would free from any state excise taxes the business and other income-producing activities of all Indians, whether carried on within the confines of an Indian reservation or outside the Indian reservation, and whether carried on by an individual Indian or by a tribe or by an independent corporation created by the tribe.

STATEMENT OF FACTS

The significant facts in each of these cases have been set forth in other briefs, and need not be repeated here in any detail. In bare outline, they are as follows:

1. **Tonasket.**

Tonasket, a full blood member of the Colville tribe, conducts a retail business (primarily for the sale of cigarettes) which he owns on his allotted lands on the Colville Indian reservation. He purchases name brand cigarettes from out-of-state distributors and then sells them primarily to non-Indians free of any state tax. The federal cigarette tax is paid on all cigarettes which he sells. It is clear that profits from Tonasket's business are subject to the federal income tax. The Colville tribe has given its consent to the state of Washington to assume criminal and civil jurisdiction, which Washington has done pursuant to Public Law 83-280, 67 Stat. 588, 28 U.S.C.A. § 1360 (1964), and chapter 37.12 Revised Code of Washington (RCW).

2. **McClanahan.**

McClanahan is a full blood member of the Nav-

ajo tribe; resides on the Navajo reservation in Arizona; and earns wages from employment on the reservation. It is clear that her income in question is subject to the federal income tax.

3. Mescalero

The Mescalero Apache tribe has constructed and operates ski resort facilities on properties off the reservation leased by a tribal corporation from the United States Forest Service. The development of the facilities was made possible by loans from the United States under authority of 25 U.S.C. 470, but the facilities were built by and are operated by the tribal corporation subject to federal approval as to plans for initial facilities, construction of improvements and arrangements for sub-leasing, budgeting and accounting.

SUMMARY OF ARGUMENT

There is no question, as pertains to these three cases (*Mescalero*, *McClanahan* and *Tonasket*), that the location of the respective taxable activities is within the territorial limits of the respective states which are asserting jurisdiction. No treaties, statehood enabling legislation or federal statutes remove these locations from the territorial limits of the respective states. *Surplus Trading Co. v. Cook*, 281 U.S. 647, 74 L ed 1091 (1930); *State of New York ex rel. Ray v. Martin*, 326 U.S. 496, 90 L ed 261 (1946); *United States v. McGowan*, 302 U.S. 535, 82 L ed 410 (1938); *United States v. McBratney*, 104 U.S. 621, 26 L ed 869 (1882); *Draper v. United States*, 164 U.S. 240, 41 L ed 419 (1896); *Thomas*

v. Gay, 169 U.S. 264, 42 L ed 740 (1898); *Wagoner v. Evans*, 170 U.S. 588, 42 L ed 1154 (1898); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 50 L ed 398 (1906); *Williams v. Lee*, 358 U.S. 217, 3 L ed 2d 251 (1959); *Organized Village of Kake v. Egan*, 369 U.S. 60, 7 L ed 2d 573 (1962). It is clear then that jurisdiction exists in a general sense. The question is whether or not it exists in terms of the specific manner in which it is exercised in these tax cases.

The question is answered by an analysis of the legal principles which apply to these respective matters. None of these principles would preclude the exercise of jurisdiction. The states of Washington, New Mexico and Arizona are not taxing any property or interests in property. The taxes in issue are general excise taxes imposed on income or receipts derived from employment or business operations.

In the *Tonasket* case, there is an affirmative assumption of criminal and civil jurisdiction by the state of Washington and a relinquishment of jurisdiction by the Colville tribe pursuant to applicable federal (PL 83-280, 67 Stat. 588, 28 U.S.C.A. § 1360 (1964), *supra*),[1] state (chapter 37.12 RCW, *supra*), and tribal law (Colville Business Council Resolution 1965-4). Any claimed tax immunity in the *Tonasket* case must first be predicated on the argument that the controlling federal statute does not mean what it says. Assuming, *arguendo*, that the federal statute (PL 280) does not mean what it says, Tonasket must establish either (1) that he is

[1]Hereinafter referred to as PL 280.

a federal instrumentality and thus impliedly immune from state excise taxes in his private profit proprietary endeavors, or (2) that the United States has preempted the field. Since there is no reason to suppose that the doctrine of implied governmental immunity is broader as pertains to Indians in their individual capacity than to anyone else, it is clear that this doctrine does not grant Tonasket any exemption. Furthermore, there has been no preemption because Tonasket is not in any way regulated by the federal government in regard to the sales in which the state of Washington is interested, namely, his sales to non-Indians (Washington exempts from its cigarette tax laws sales by Indians to Indians).

In *McClanahan*, the only restriction applicable is that of implied governmental immunity. It is no more applicable to *McClanahan* than to *Tonasket*.

In *Mescalero*, the issues are again those pertaining to preemption by the Congress and to implied governmental immunity. There is no preemption because the Indian Trader Act applies only to traders on the reservation. Furthermore, no exemption from state taxation can be inferred from the fact that the federal government loaned money to finance and took the normal lender precautions of overseeing the utilization of that money within the terms of the loan. Nor may immunity be inferred from the fact that the ski resort is located on federal forest lands leased to the tribe. Finally, in conducting a *proprietary enterprise*, the tribe is not impliedly immune from state excise taxes under the doctrine of implied governmental immunity.

Apart from any consideration of express federal legislation (PL 280), *Mescalero*, *McClanahan* and *Tonasket* are controlled by the tax decisions of this court upholding taxation of Indians in the Oklahoma estate tax cases of *Oklahoma Tax Com. v. United States*, 319 U.S. 598, 87 L ed 1612 (1943), and *West v. Oklahoma Tax Commission*, 334 U.S. 717, 92 L ed 1676 (1948); the United States income tax cases of *Five Civilized Tribes v. Com'r of Int. Rev.*, 295 U.S. 418, 79 L ed 1517 (1935), *Choteau v. Burnet*, 283 U.S. 691, 75 L ed 1353 (1931); *Com'r of Int. Rev. v. Walker*, 326 F.2d 261 (CCA 9th, 1964); and *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 82 L ed 907 (1938); and the state income tax case of *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420, 80 L ed 771 (1936); and property and excise tax cases such as *McCurdy v. United States*, 246 U.S. 263, 62 L ed 706 (1918), *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 72 L ed 709 (1928), and *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F 2d 1184 (CCA 9th, 1971), cert. den. U.S. Supreme Court February 22, 1972.

Arguments for appellants' position in these causes proceed upon the erroneous assumption, contrary to the *Kake* case, *supra*, and to decisions referred to both herein and in *Kake*, that the states possess no tax jurisdiction over Indians except as specifically authorized by Congress. Since there is no expressed or implied prohibition to the tax impositions here questioned, appellants' arguments are clearly fallacious.

The *Kake* case, *supra*, and *Williams v. Lee*, *supra*, establish the principle that the states have a residual jurisdiction over Indian affairs subject to two conditions: (1) That Congress has not preempted the field, and (2) that the exercise of state jurisdiction does not interfere with the Indians' right of self-government.

Where there is no conflict between federal and state authority, and when the state action is in an area left void *in fact* by Indian local self-government, both logic and necessity dictate that state law should fill the gap.

ARGUMENT

1. An Indian Reservation is Within the Territorial Jurisdiction of The State in Which it is Located.

Premised on the early cases of *Worcester v. Georgia* (U.S.), 6 Pet. 515, 8 L ed 483; *Kansas Indians* (*Blue Jacket v. Johnson County*) (U.S.), 5 Wall 737, 18 L ed 667 (1866); and *New York Indians* (*Fellows v. Denniston*) (U.S.), 5 Wall 761, 18 L ed 708 (1866), the argument is made on behalf of the appellants in these causes that the states have no jurisdiction over Indian reservations except as expressly authorized by Congress. This argument is best expressed in terms of geography; an Indian reservation is "off limits" to state jurisdiction. However, under later cases such as *Kake v. Egan*, *supra*, 369 U.S. 60, 70 L ed 2d 573 (1962); *Surplus Trading Co. v. Cook*, *supra*, 281 U.S. 647, 74 L ed 1091 (1930); *New York ex rel. Ray v. Martin*, *supra*, 326 U.S. 496, 90 L ed 261 (1946); *United States v.*

McGowan, supra, 302 U.S. 535, 82 L ed 410 (1938); and *Williams v. Lee, supra*, 358 U.S. 217, 3 L ed 2d 251 (1959), any such territorial approach to the problem of state taxing jurisdiction is unwarranted, and obscures the true nature of the problems in the instant cases.

Surplus Trading Co. v. Cook, supra, described the conditions under which the states may exercise jurisdiction over Indian reservations, as follows:

> "It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.
>
> "A typical illustration is found in the usual Indian reservation set apart within a state as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life. Such reservations are part of the state within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards. * * *" (281 U.S. at 650-651.)

An even more unqualified statement was made in *State of New York ex rel. Ray v. Martin, supra*:

> "* * * in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries. * * *" (326 U.S. at 499, quoted with approval in *Kake v. Egan*, 369 U.S. at 74.)

In *United States v. McGowan, supra*, this court held, with reference to the Reno Indian colony in Nevada, which was purchased by the United States for use of Indians:

> "The Federal prohibition against taking intoxicants into this Indian colony does not deprive the State of Nevada of its sovereignty over the area in question. The Federal Government does not assert exclusive jurisdiction within the colony. Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the Federal enactments." (302 U.S. at 539.)

As more recently stated by this court in *Kake v. Egan, supra*:

> "The general notion drawn from Chief Justice Marshall's opinion in Worcester v Georgia (US) 6 Pet 515, 561, 8 L ed 483, 501; Kansas Indians (Blue Jacket v Johnson County) (US) 5 Wall 737, 755-757, 18 L ed 667, 672, 673; * * * that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. *By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law.* [Citation omitted.] In Langford v Monteith, 102 US 145, 26 L ed 53, the Court held that process might be served within a reservation for a suit in territorial court between two non-Indians. In United States v McBratney, 104 US 621, 26 L ed 869, and Draper v United States, 164 US 240, 41 L ed 419, 17 S Ct 107, the Court held that murder of one non-Indian by another on a reservation was a matter for state law." (369 U.S. at 72-73.) (Emphasis added.)

In *Williams v. Lee, supra*, this court, in commenting on the principles enunciated in *Worcester v. Georgia, supra*, stated as follows:

> "* * * Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained. * * * Essentially, absent governing Acts of Congress, *the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.* * * *" (358 U.S. at 219-220) (Emphasis added.)

These cases point out the proper direction and focus for our inquiry. First, it is to determine whether the effect of the state taxes here in question conflicts with enunciated federal legislation and policies concerning Indian affairs.[1] As will be demonstrated, the taxes in question are not forbidden by any act of Congress or by treaty provisions, and do not directly impinge upon any federal policy. Secondly, our inquiry must determine whether the taxes involved in these causes conflict with tribal self-government. As will also be demonstrated, there is no such conflict.

2. Imposition of the Taxes in the Instant Causes Is Not in Conflict With any Federal Statutes or Regulations Concerning the Individual Indians and the Indian Tribes in Question.

The appellants and the amici curiae for the ap-

[1] The appellants' argument that the states have no jurisdiction over Indians or their lands unless specifically granted by Congress is refuted by their preemption argument. Preemption has application and meaning only where both the federal government and the states have concurrent jurisdiction over the subject matter. The subject matter is preempted by Congress only when Congress exercises jurisdiction in such a manner that any state legislation over the same subject matter would be conflicting.

TABLE OF CASES—Continued

Page

New York Indians (Fellows v. Denniston), (U.S.) 5 Wall 761, 18 L ed 708 (1866) 8

New York v. United States, 326 U.S. 572, 90 L ed 326 (1946) 25, 26, 28

Oklahoma Tax Com. v. United States, 319 U.S. 598, 87 L ed 1612 (1943) 7, 15, 18, 19, 21, 22, 23, 25, 27, 29

Oklahoma Tax Com. v. Texas Co., 336 U.S. 342, 93 L ed 721 (1949) 19, 20, 21, 23, 25

Organized Village of Kake v. Egan, 369 U.S. 60, 7 L ed 2d 573 (1962) 5, 8, 9, 10, 27, 31

Penn Dairies, Inc. v. Milk Control Com. of Pennsylvania, 318 U.S. 261, 87 L ed 748 (1943) 19

Shaw v. Gibson-Zahniser Oil Corp., 276 U.S. 575, 72 L ed 709 (1928) 7

Squire v. Capoeman, 351 U.S. 1, 100 L ed 883 (1956) 13, 29, 30

State of New York ex rel. Ray v. Martin, 326 U.S. 496, 90 L ed 261 (1946) 4, 8, 9

Sullivan v. United States, 395 U.S. 169, 23 L ed 2d 182 (1969) 12

Surplus Trading Co. v. Cook, 281 U.S. 647, 74 L ed 1091 (1930) 4, 8, 9

Thomas v. Gay, 169 U.S. 264, 42 L ed 740 (1898) 4, 5

United States v. Alabama, 313 U.S. 247, 85 L ed 1327 (1941) 14

United States v. Detroit, 355 U.S. 466, 2 L ed 2d 424 (1958) 12, 13, 19

United States v. McBratney, 104 U.S. 621, 26 L ed 869 (1882) 4

United States v. McGowan, 302 U.S. 535, 82 L ed 410 (1938) 4, 8, 9, 10

United States v. Rickert, 188 U.S. 432, 47 L ed 532 (1903) .. 23

Wagoner v. Evans, 170 U.S. 588, 42 L ed 1154 (1898) 5

West v. Oklahoma Tax Commission, 334 U.S. 717, 92 L ed 1676 (1948) 7, 14, 22-23, 29, 30

Williams v. Lee, 358 U.S. 217, 3 L ed 2d 251 (1959) 5, 8, 9, 11, 31

Worcester v. Georgia (U.S.), 6 Pet. 515, 8 L ed 483 ... 8, 11, 32

FEDERAL STATUTES

25 USC § 261-264 15

25 USC § 349 (General Allotment Act), § 6 30

25 USC § 465 16

25 USC § 476 17

25 USC § 477 17

25 USC 470 ..... 4, 18

FEDERAL STATUTES—Continued

Page

Indian Reorganization Act of 1934 (48 Stat. 984 (1934), 25 USC 461 et seq.) 16, 17
32 Stat. 982, 1009 (25 USC § 262) 3
Public Law 83-280, 67 Stat. 588, 28 USCA § 1360 (1964) 3, 5, 7

STATE STATUTES

Washington
Chapter 37.12 Revised Code of Washington 3, 5

OTHER AUTHORITY

Colville Business Council Resolution 1965-4 5
78 Cong. Rec. 11730 16
78 Cong. Rec. 11732 17

TEXTS

Cooley on Taxation, Vol. 1 (4th ed.), § 260, 292 13

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1971

Nos. 71-738, 71-834, 71-1031

MESCALERO APACHE TRIBE, *Petitioner,*

v.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, *Respondents.*

ROSALIND McCLANAHAN, on behalf of herself and all others similarly situated, *Appellant,*

v.

ARIZONA STATE TAX COMMISSION, *Appellee.*

LEONARD TONASKET, *Appellant,*

v.

THE STATE OF WASHINGTON, *et al.*, *Appellees.*

ON CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO, AND ON APPEAL FROM SUPREME COURT OF ARIZONA AND SUPREME COURT OF WASHINGTON

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION

STATEMENT OF INTEREST

This brief is submitted, with the written consent of the parties, to permit the Multistate Tax Commission to supplement the arguments of the appellees in each of these causes.

fact that not all property of every citizen is available to meet validly imposed tax obligations. This alone does not invalidate a tax.

In *United States v. Alabama*, 313 U.S. 247, 85 L ed 1327 (1941), this court recognized the validity of a state tax and the lien arising thereunder, even though the lien could not be enforced against the United States without its consent because of federal ownership of the property subject to the lien.

The precise question of collection of a state tax from Indian restricted or trust property was faced by the court in *West v. Oklahoma Tax Commission*, *supra*, 334 U.S. 717, 92 L ed 1676 (1948). This court there noted:

> "* * * It is therefore possible that if the tax were unpaid Oklahoma might try to place a lien upon the property which is being transferred, property as to which the United States holds legal title. Complications might arise as to the validity of such a lien. And the United States would be burdened to the extent of opposing the imposition of the lien or seeing that the tax was paid so as to avoid the lien." (334 U.S. at 725)
>
> "The result of permitting the imposition of the inheritance tax on the transfer of trust properties may be, as we have noted, to deplete the trust corpus and to create lien difficulties. But those are normal and intended consequences of the inheritance tax. And until Congress has in some affirmative way indicated that these burdens require that the transfer be immune from the inheritance tax liability, the Oklahoma Tax Commission Case permits that liability to be imposed. * * *" (334 US at 727)

Thirdly, the appellants suggest that federal legislation generally establishing a protective policy

toward the Indians and their lands supports the tax exemption here claimed. This protective policy which placed the Indian in a ward or dependent status was not only implemented by restrictions on the Indian's ability to dispose of his land, but was also implemented by the Indian Trader Act (25 USC §§ 261-264)[4] and specific policies and programs of the government for the economic rehabilitation of the Indians.

However, the fact that in these particulars Congress has sought to treat the Indian as a ward or dependent of the United States does not create any general immunity from state taxation.

As noted by this court in *Oklahoma Tax Com. v. United States, supra*:

> "It is true that our interpretation of the 1933 statute must be in accord with the generous and protective spirit which the United States properly feels toward its Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of its Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. We have held that the Indians, like all other citizens, must pay federal income taxes. Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue, supra (295 US 421, 79 L ed 1520, 55

[4] As shown in the brief of appellees' in *Tonasket*, the Indian Trader Act has no application in any of these cases, for the reason that the activities taxed in these causes are in no way regulated by the Indian Trader Act.

S Ct 820). 'Wardship with limited power over his property' did not there 'without more render [the Indian] immune from the common burden.' * * *"

The correctness of this court's refusal to consider the wardship or dependency status of the Indian as a basis for tax exemption is reinforced by the limited nature of the overall protective policy mentioned above.

Coupled with this protective policy was the policy of removing the Indian and his land from any dependent or wardship relation with the United States, while preserving tribal customs and laws. Such, for example, was the purpose of the Indian Reorganization Act of 1934 (48 Stat. 984 (1934), 25 U.S.C. 461 *et seq.*). The following sections of the United States Code are provisions of this act and embody those dual policies.

25 U.S.C. § 465 authorizes acquisition of lands for Indians which are tax-exempt and held in trust. Up to $2 million may be appropriated for this purpose. In congressional debate on this section, the purpose was stated to be consolidation of badly checker-boarded reservations and supplementation of Indian stock grazing and forest lands, 78 Cong. Rec. 11730.

25 U.S.C. § 470 establishes a $20 million revolving fund and authorizes loans to Indian chartered corporations for the purpose of promoting economic development of tribes and members. Congress intended this provision to be broad enough to permit loans to corporations or individual members, 78 Cong. Rec. 11730.

An Indian chartered corporation for profit does not have the same status as an Indian tribe under the Indian Reorganization Act of 1934. The latter is organized for *governmental purposes* under 25 U.S.C. § 476. The former is organized under 25 U.S.C. § 477 and requires petition by one-third of the adult Indians and ratification by a majority of them of a corporate charter. Such charter may convey to the incorporated tribe power to manage real and personal property and "such further powers as may be incidental to the conduct of corporate business, *not inconsistent with the law*," 25 U.S.C. § 477. (Emphasis added.)

The intent of congress in separating its appropriations for land acquisition and loans, as well as its provisions for tribal and corporate organization, is clear. Tribal organization and the consolidation of reservations further the federal policy of preserving Indian customs and management of their *own* affairs. Corporate organization and the loan fund further the federal policy of integrating the Indians into the American economic life. As the sponsor of the Indian Reorganization Act stated:

> "* * * the program of self-support and of business and civic experience in management of their own affairs * * * will permit increasing numbers of Indians to enter the white world on a footing of *equal* competition." (78 Cong. Rec. 11732) (Emphasis added.)

This goal of economic integration is being attained; as instances of this, we need only look to the cigarette selling activities of Mr. Tonasket, and the ski resort enterprise of the Mescalero Apache Tribe.

Their activities are in direct competition with similar non-Indian business enterprises, and their financial success depends upon essentially non-Indian market or clientele.

Neither property tax exemptions on trust or restricted land, nor possible collection problems, nor wardship status should exempt these activities from the common tax burden, or provide the basis for implying a congressional intent that there be such an exemption.

> "This Court has repeatedly said that tax exemptions are not granted by implication. * * * It has applied that rule to taxing acts affecting Indians as to all others." (*Oklahoma Tax Com. v. United States*, 319 U.S. at 606.)

3. **The Principle of Implied Governmental Immunity Does Not Free The Appellants From the Taxes in Question.**

In substance, the appellants and amici curiae in these causes argue for the application of the principle of implied governmental immunity. However, the fact that the taxes in question here may have indirect or remote effect on some United States government policy concerning Indian affairs, or on self-government reserved to the Indian tribes by treaty, does not control.

The instant cases present, we suggest, a familiar problem in a perhaps less familiar context, i.e., the problem of implied governmental tax immunity. The decisions of this court on the question of state taxing power as it affects federal activities, and the decisions on the question of federal taxing power as

it affects state activities, provide clear guidelines for resolving the problem of state taxing power as it affects Indian activities. We also suggest that the pattern of this court's decisions is to resolve questions in each of these three separate areas on a consistent basis, and that the clear trend of these decisions, in each of the three areas, is to narrow the scope of implied tax immunity, be that immunity invoked on behalf of the United States, a state, or an Indian. This narrowing has occurred primarily through a complete discarding of the former "economic burden" test. See generally *Graves v. New York, supra*, 306 U.S. 466, 83 L ed 927 (1939); *Helvering v. Mountain Producers Corp., supra*, 303 U.S. 376, 82 L ed 907 (1938); *Oklahoma Tax Com. v. Texas Co.*, 336 U.S. 342, 93 L ed 721 (1949); *Alabama v. King & Boozer*, 314 U.S. 1, 86 L ed 3 (1941); *Curry v. United States*, 314 U.S. 14, 86 L ed 9 (1941); *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L ed 155 (1937); *Penn Dairies, Inc. v. Milk Control Com. of Pennsylvania*, 318 U.S. 261, 87 L ed 748 (1943); *Esso Standard Oil Co. v. Evans*, 345 U.S. 495, 97 L ed 1174 (1953); *United States v. City of Detroit, supra*, 355 U.S. 466, 2 L ed 2d 424 (1958).

Of these cases, *Oklahoma Tax Com. v. Texas Co., supra, Helvering v. Mountain Producers Corp., supra* and *Oklahoma Tax Com. v. United States, supra* are of special importance.

In *Oklahoma Tax Com. v. Texas Co., supra*, this court had before it the question of:

> "* * * whether a lessee of mineral rights in allotted and restricted Indian lands is immu-

nized by the Constitution against payment of nondiscriminatory state gross production taxes and state excise taxes on petroleum produced from such lands. * * *" (336 U.S. at 343)

In answering this question, the court noted:

"* * *[I]t has long been established that property owned by a private person and used by him in performing services for the Federal Government is subject to state and local ad valorem taxes. * * *" (336 U.S. at 350)

"Moreover, even if the status of respondents as federal instrumentalities, in the sense in which they use the term, were fully conceded, it seems difficult to imagine how any substantial interference with performing their functions as such in developing the leaseholds could be thought to flow from requiring them to pay the small tax Oklahoma exacts to satisfy their shares of the state's expense in maintaining and administering its proration program. * * *" (336 U.S. at 351)

The Court then noted the uniform pattern which had developed both in the area of state taxation and in the area of federal taxation:

"* * * this Court's more recent pronouncements have beaten a fairly large retreat from its formerly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions—to restrict the scope of immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation. The history of the immunity, by and large in both aspects, represents a rising or expanding curve, tapering off into a falling or contracting one." (336 U.S. 352)

This court then analyzed in detail the history of some of the immunity cases as pertained to Indians. It attributed particular importance to *Helver-*

ing v. Mountain Producers Corp., supra, 303 U.S. 376, 82 L ed 907 (1938), a case involving federal taxing power over an alleged state instrumentality.

In *Helvering* the court found that a lessee under an oil and gas lease of state school lands is not entitled to immunity, as a state instrumentality, from federal taxation in respect of income derived from operations under the lease. This same rule was applied in *Oklahoma Tax Com. v. Texas Co., supra,* to the state taxes there involved. The *Helvering v. Mountain Producers Corp.* test, quoted in *Oklahoma Tax Com. v. Texas Co., supra,* is that:

> "* * * immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects. * * *" (303 U.S. at 386)

In *Helvering,* the court further refined the test by stating:

> "* * * And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote. * * *" (303 U.S. at 386-387)

In *Oklahoma Tax Com. v. United States, supra,* 319 U.S. 598, 87 L ed 1612 (1943), in upholding an Oklahoma estate tax, the court again affirmed *Helvering v. Mountain Producers Corp., supra,* and noted that:

"• • • The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication." (319 U.S. at 604)

"• • • A federal court has held, in a well reasoned decision defended before us by the Solicitor General of the United States, who is not a party to this action, that an Indian's estate is subject to the federal estate tax. Landman v. Commissioner of Internal Revenue (CCA 10th) 123 F (2d) 787. Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes." (319 U.S. at 608)

"Recognizing that equality of privilege and and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. Graves v. New York, 306 US 466, 83 L ed 927, 59 S Ct 595, 120 ALR 1466, permitted States to impose income taxes upon government employees and Helvering v. Gerhardt, 304 US 405, 82 L ed 1427, 58 S ct 969, permitted the federal government to impose taxes on state employees. O'Malley v. Woodrough, 307 US 277, 83 L ed 1289, 59 S Ct 838, 122 ALR 1379, overruled a previous decision which held that judges should not pay taxes just as other citizens, and Helvering v. Mountain Producers Corp. 303 US 376, 82 L ed 907, 58 S Ct 623, supra, repudiated former decisions seriously limiting state and federal power to tax. See also Metcalf v. Mitchell, 269 US 514, 70 L ed 384, 46 S Ct 172, and James v. Dravo Contracting Co. 302 US 134, 82 L ed 155, 58 S Ct 208, 114 ALR 318. The trend of these cases should not now be reversed." (319 U.S. 610)

The holding of *Oklahoma Tax Com. v. United States, supra*, was reaffirmed in *West v. Oklahoma Tax Commission, supra*, 334 U.S. 717, 92 L ed 1676

(1948), and extended to property held in trust by the United States for the benefit of the decedent Indian and his heirs. The court there noted that its decision in *Oklahoma Tax Com. v. United States, supra,* foreclosed an application of *United States v. Rickert,* 188 U.S. 432, 47 L ed 532 (1903).

Thus, *Rickert* provides no basis for resurrecting discarded notions of implied immunity, and should be confined to its facts, *i.e.*, to a situation in which a property tax was imposed directly upon property owned by the United States for the use and benefit of an Indian.

The reference, in *Oklahoma Tax Com. v. United States, supra,* to the applicability of the federal estate tax to Indians highlights an important principle established by *Helvering v. Mountain Producers Corp., supra, Oklahoma Tax Com. v. Texas Co., supra,* and *Oklahoma Tax Com. v. United States, supra.* Absent a clearly expressed congressional intent to the contrary, Indian immunity from state taxation (or lack thereof) should parallel Indian immunity from federal taxation (or lack thereof) and each should be determined by the same test.

This principle is also established by decisions of this Court involving state and federal taxation of Indian income.

Choteau v. Burnet, supra, 283 U.S. 691, 75 L ed 1353 (1931); *Five Civilized Tribes v. Com'r of Int. Rev., supra,* 295 U.S. 418, 79 L ed 1517 (1935); *Leahy v. State Treasurer of Oklahoma, supra,* 297 U.S. 420, 80 L ed 771 (1936). *Choteau* upheld the

imposition of the federal income tax on income received by a member of an Indian tribe as his share of royalties from oil and gas leases of tribal land, which was payable to him without restriction. *Leahy* upheld the imposition of a state income tax upon a competent member of the Osage tribe on income from his share of restricted mineral resources of the tribe.

This court there noted:

> "The facts are substantially the same as those presented in Choteau v. Burnet, supra, which upheld a federal income tax on a like payment. The applicable statutes and decisions are discussed there. As Leahy was entitled to have the income paid to him and was free to use it as he saw fit, no reason appears why it should not be taxable also by the State." (297 U.S. at 421)

In *Five Civilized Tribes v. Com'r of Int. Rev., supra*, the court upheld the imposition of the federal income tax on income derived from investment of surplus income from restricted land which was exempt from taxation as long as the title remained in the original allottee. Upholding the tax, the court noted:

> "We find nothing in either [federal statutes concerning the exemption of the land] which expresses definite intent to exclude from taxation such income as that here involved. See Shaw v. Gibson-Zahniser Oil Corp. 276 U.S. 575, 581, 72 L ed. 709, 714, 48 S. Ct. 333.
>
> "Nor can we conclude that taxation of income from trust funds of an Indian ward is so inconsistent with that relationship that exemption is a necessary implication. Nontaxability and restriction upon alienation are distinct things. [Citation omitted.] The taxpayer here is a citizen of the United States, and *wardship with limited power over his property does not, without more, render him immune from the common burden.*
>
> "Shaw v. Gibson-Zahniser Oil Corp. 276 U.S. 575, 72 L ed. 709, 48 S. Ct. 333, supra, held that

restricted land purchased for a full-blood Creek —ward of the United States—with trust funds was not free from state taxation, and declared that such exemption could not be implied merely because of the restrictions upon the Indian's power to alienate." (295 U.S. at 421) (Emphasis added.)

The taxpayers in the instant cases are no more federal instrumentalities, and immune as such from state taxation, than were the taxpayers in *Oklahoma Tax Com. v. United States, supra,* and *Oklahoma Tax Com. v. Texas Co., supra.* And just as their income producing activities are not immunized from the scope of federal taxation, neither should they be immunized from the scope of state taxation.

In *New York v. United States,* 326 U.S. 572, 90 L ed 326 (1946), this court refused to exempt the state of New York from a federal tax imposed upon sales of mineral waters when the state engaged in the business of selling mineral waters. The court then noted:

"It is enough for present purposes that the immunity of the State from federal taxation would, in this case, accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning. Its exercise now, by a non-discriminatory tax, does not curtail the business of the state government more than it does the like business of the citizen. It gives merely an accustomed and reasonable scope to the federal taxing power. Such a withdrawal from a non-discriminatory federal tax, and one which does not bear on the State any differently than on the citizen, is itself an impairment of the taxing power of the national government, and the activity taxed is such that its taxation does not unduly impair the State's functions of government. The nature of the tax immunity requires that it be so construed as to allow to each government reasonable scope for

pellants have not pointed to and do not rely upon any express federal statutes or regulations which expressly prohibit the imposition of the state taxes in question. However, a common argument of the appellants and amici curiae for appellants pertaining to conflicting federal legislation stems from the notion that the taxes in question are taxes somehow imposed upon restricted or trust lands or funds of the Indians and Indian tribal organization in question, such lands themselves being exempt from taxation by reason of express treaty provisions. Such an argument misconceives the legal incidence and nature of the taxes with which we are here concerned. *McClanahan* involves a general income tax on earnings. It has long been settled that an income tax is not a tax on property or an interest in property. An income tax, by its very nature, is an excise tax imposed upon an abstract concept of taxable income. As stated in *Graves v. New York*, 306 U.S. 466, 83 L ed 927 (1939):

> "* * * The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, [cases cited] * * *" (306 U.S. at 480)

The same is true in regard to the New Mexico gross receipts tax and compensating (use) taxes involved in *Mescalero* and the Washington cigarette tax involved in *Tonasket*. A tax upon the use or sale of property is not a tax on the property. *Sullivan v. United States*, 395 U.S. 169, 23 L ed 2d 182 (1969); *United States v. Detroit*, 355 U.S. 466, 2 L ed 2d 424

(1958). Indeed, if these taxes were considered property taxes, they would undoubtedly be invalid by reason of *state law*, as their imposition would violate state constitutional property tax uniformity requirements.[4]

The congressional policy of exempting from state and federal taxes trust or restricted property of Indians or Indian tribal organizations is not applicable to these causes. This type of property was the subject of taxation involved in *Squire v. Capoeman*, 351 U.S. 1, 100 L ed 883 (1956). That case properly held that the federal income tax could not be applied to the proceeds of timber taken from the land since it was in substance a tax on the land. In contrast, the taxes in the instant causes are personal income or general business excise taxes. Their incidence does not fall on any property or interest in property.

A second common argument, related to the first, is that since the taxes in question under state law can create liens for collection against tax exempt property of the Indians, the taxes themselves are invalid. However, the validity of the imposition of a tax does not turn on whether or not all of the assets or property of the taxpayer are available for enforcement of the tax by lien, attachment, execution, or otherwise. This court can take judicial notice of the

[4]This conclusion follows because the imposition of an additional tax on some property and not on other property violates the common uniformity requirements of equality of rate of taxation. For example, if a use tax were a tax on property, its imposition on property acquired during the tax year would impose an additional tax and thus higher rate on this property compared to all other property for the year in which it was acquired. Cooley on Taxation, Vol. 1 (4th ed.), § 290, 292.

its taxing power, Metcalf v. Mitchell, 269 US 514, 524, 70 L ed 384, 392, 46 S Ct 172. * * *" (326 U.S. at 588-589)

Applying these principles to the instant cases, it is clear that none of the taxes in question so affect the Indians or the federal government that they must be stricken. They have only an indirect or remote effect on any governmental operations or policies. The *Tonasket* case revolves around the ability of an individual Indian to carry on the business of selling cigarettes free of the Washington cigarette tax. The *McClanahan* case involves the individual income tax liability of an individual Indian. In *Mescalero*, an Indian tribe claims to have the right to construct and operate a ski resort business of substantial magnitude without incurring any state liability whatsoever. It makes this claim even though the property and business in question are located off reservation property.

Indirectly, the appellants and their amici curiae are asking this court to do one of two things: either declare that Indians and their tribal organizations are instrumentalities of the federal government or that Indians and their tribal organizations, to the extent that they implement federal economic policy for the Indians, are so closely related to a federal instrumentality that immunity is to be implied. Neither of these requests is supportable by the case law defining the scope of governmental immunity of the Indians from either state or federal taxation. Furthermore, if the government's objective is to assimilate the Indians into society as competent

equal members of the business community—the stated objective—it is difficult to see how this can be accomplished without them sharing generally in the privileges and responsibilities of government, which includes their bearing their share of general business tax obligations.

Indeed, a striving for equality of tax burdens has been the source for this Court's narrowing of the scope of implied governmental immunity, including the federal instrumentality doctrine. As stated in *Oklahoma Tax Com. v. United States, supra*:

> "Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism." 319 U S at 610.

Should the Congress wish to resurrect such favoritism and reverse the trend, it may do so by express enactment. But until it does, the trend of this Court in sweeping away tax favoritism should continue.

4. The Taxes Imposed in These Causes Do Not Conflict With the Indian Right of Self-Government.

In *Kake v. Egan, supra*, 369 U.S. 60, 7 L ed 2d 573 (1962), this court rightly noted that:

> "Decisions of this Court are few as to the power of the States when not granted Congressional authority to regulate matters affecting Indians. * * *" (369 U.S. 74)

As to these decisions, however, the court noted:

> "These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. * * *" (369 U.S. 75)

Does the right of reservation-self-government prohibit the state taxes involved in the instant cases? We suggest that it does not, and that these taxes are perfectly compatible with that right.

If that right be conceived of as including the right to impose a tax upon the same activities or income as the state attempts to tax, no conflict thereby arises. An exercise of the taxing power of even such a sovereign as the federal government in no way precludes state taxation of the same subjects. Concurrent exercise of taxing powers by different sovereigns is an inherent part of our governmental system.

But should that right be conceived of as including the right to be immune from any exercise of state taxing power over commercial enterprises of the tribe or its members? This problem is perhaps presented in its most acute form by the *Mescalero* case, in which either the tribe or a corporation owned by it is the taxpayer. We suggest that, even if the tribal enterprise were fully on the reservation—which it is not—its taxation by New Mexico would not be in conflict with the tribe's right of self-government.

Again, a case from the field of intergovernmental immunity provides the guideline.

The test applied by this court in *New York v. United States*, *supra*, preserves unrestricted the traditional sovereign powers of the state, while at the same time refusing to allow that sovereignty to be a basis for immunizing from taxation state enterprises of the same type as are conducted by private

businesses. Certainly, the right of a tribe to self-government should no more be a shield against taxation than is the sovereignty of a state. Again, tax favoritisms may be established—both for a state or a tribal business enterprise—as a matter of congressional grace. But no such favoritisms should be implied from the concept of self-government or sovereignty, be it tribal or state.

5. Squire v. Capoeman, 351 U.S. 1, 100 L ed 883 (1956), Does Not Preclude Application Of The Taxes In The Instant Causes.

In this brief, we have placed great reliance upon *Oklahoma Tax Com. v. United States*, 139 U.S. 598, 87 L ed 1612 (1943), and *West v. Oklahoma Tax Com.*, 334 U.S. 717, 92 L ed 1676 (1948). By reason of a Court of Claims' decision (*Mason v. United States*, June 16, 1972, appended to the Brief of Amicus Estate of Rose Mason, filed in McClanahan) the question arises as to whether this reliance is misplaced. For the Court of Claims held that *Squire v. Capoeman, supra*, has overruled at least *West*, if not both cases.

Note first that *Squire v. Capoeman* starts with two basic principles which are central to our whole brief:

> "We agree with the Government that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed. * * *" (351 U.S. at 6)

Thus, the tax exemption found in *Squire v. Capoe-*

man rested upon a specific congressional enactment, *i.e.*, section 6 of the General Allotment Act, 25 USC 349. In applying this provision, this Court stated:

> "The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted." (351 U.S. at 8)

And the court in *Squire v. Capoeman, supra*, went on to hold where timber on the allotment is converted to money through sale of that timber, the exemption applies to the proceeds of the sale, so as to preclude a federal capital gains tax.

This holding does indeed cast doubt on one of the grounds of *West*, *i.e.*, it casts doubt on the proposition that a tax, such as inheritance tax (or a capital gains tax as in *Squire*) may be valid as applied to trust property even though its direct effect is to diminish the corpus of the trust.

However, we do not rely, in the instant cases, on this aspect of *West*. In none of the instant cases is the tax involved either imposed upon or measured by trust property or the proceeds from the conversion thereof into money.

In essence, *Squire* held that Congress did not intend to take away with one hand, through the capital gains tax, a tax exemption which it had granted with the other hand, through section 6 of the General Allotment Act. In the instant cases, in contrast, we can find no congressional enactment which grants any applicable tax exemption in the first place.

CONCLUSION

The above cited cases collectively stand for the proposition that general nondiscriminatory taxes imposed on individual Indian citizens as residents and citizens of the state and United States are applicable if not expressly forbidden by congressional enactment. No exemptions are implied. Here, the Indians have sought to engage in general business activities or employment within the state. There is no reason to place them on a different economic footing than any other resident citizen of their respective states as to these business activities. The question of whether or not they are "competent" or "incompetent" pertains solely to their relationship with their interests individually or collectively in land set aside for their benefit. It does not remove them as individuals from the general jurisdiction of a state for the imposition of general nondiscriminatory taxes which reach all residents and citizens alike.

It should be further noted that these tax cases upholding the state's power to impose the taxes here in question are in accord with this Court's basic principles recently announced in *Kake v. Egan, supra,* and *Williams v. Lee, supra,* that the states are free to tax where the state action does not interfere with reservation self-government. To tax the Indians in the instant cases does not any more interfere with their exercise of the right of self-government than does the state taxation of a judge's salary interfere with the right of the United States to govern itself. *Graves v. New York, supra,* 306 U.S. 466, 83 L ed 927 (1939).

The argument of the appellants and *amici curiae* for the appellants in these cases in effect isolates the Indians and the Indian communities from the rest of the United States. In substance, their argument is a return (1) to the sovereign-nation concept of *Worcester v. Georgia, supra*, which has been repudiated, and (2) to the assumption that the federal government has preempted all powers, duties and responsibilities not exercised by the Indians themselves. The history of adjudications by this court, the progression of the law on the subject of Indian affairs, and the general application of governmental immunity forcefully preclude any rule today of isolation of Indians. Further, the pattern of federal legislation in dealing with Indian questions has been to protect the Indian in his dependent status and at the same time to relieve him from that dependency by making him a responsible citizen of the state, community and nation in which he lives. This includes duties, responsibilities and privileges concerning the whole gamut of governmental affairs, including state taxation.

In closing, it should be observed that the states of Washington, New Mexico and Arizona and the Multistate Tax Commission are as much concerned about the plight of the Indian as is the United States. The businesses and the individual income here sought to be taxed would not be a reality were it not for the substantial commerce between Indians, on the one hand and non-Indian residents of the states of Washington, Arizona, and New Mexico on the other hand. It is not believed that this court will countenance, as

being in accord with its former decisions, a policy that undermines the Indians' state tax responsibility for the business activities they conduct and the income they earn within the respective jurisdictions of the states.

Respectfully submitted,

WILLIAM D. DEXTER,
Assistant Attorney General
State of Washington,

EUGENE F. CORRIGAN,
Counsel and Executive Director,
Multistate Tax Commission,

Attorneys for Amicus Curiae.

INDEX

Page

Table of Authorities ii

Argument 1

TABLE OF AUTHORITIES

CASES

Acosta v. San Diego County, 126 Cal.App.2d 455, 272 P.2d 92 (1954). 10

Agua Caliente Band of Mission Indians v. Riverside County, 442 F.2d 1184 (9th Cir.), *cert. denied*, 404 U.S. 817 (1971). 12

Begay v. Sawtelle, 53 Ariz. 304, 88 P.2d 999 (1939)... 10

Creek County v. Seber, 318 U.S. 705 (1943). 12, 15

Application of Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1958). 3

Donahue v. Justice Court, 15 Cal.App.3d 557, 93 Cal. Rptr. 310, *cert. denied* 404 U.S. 990 (1971). 18

Draper v. United States, 164 U.S. 240 (1896). 17

Grand Opera Co. v. Twentieth-Century Fox Film Corp., 235 F.2d 303 (7th Cir. 1956). 13

Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939). 19

Gray v. United States, 394 F.2d 96 (9th Cir.), *cert. denied*, 393 U.S. 985 (1968). 12

Holmberg v. Williamson, 21 Fed. Rules Serv. 63 (S.D. N.Y. 1955). 13

Kennerly v. District Court of Montana, 400 U.S. 423 (1971). 3, 5, 6, 7, 8

Leahy v. State Treasurer of Oklahoma, 297 U.S. 420 (1936). 20

Mason v. United States, —— F.2d —— (Ct.Cl. No. 417-70, June 16, 1972). ..... 10 n. 3

McClanahan v. Arizona Tax Commission, 14 Ariz. App. 452, 464 P.2d 221 (1971). 7

Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962). 18

Mull v. United States, 402 F.2d 571 (9th Cir. 1968), *cert. denied*, 393 U.S. 1107 (1969). 18

New York ex rel. Ray v. Martin, 326 U.S. 496 (1946). 17

Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943). ..... 10 n. 3, 12, 20

Organized Village of Kake v. Egan, 369 U.S. 60 (1962). 18

Ruiz v. Morton, —— F.2d —— (9th Cir. No. 25568, May 31, 1972). 13

Sears, Roebuck & Co. v. Metropolitan Engravers, 245 F.2d 67 (9th Cir. 1957). 13

Sigana v. Bailey, 282 Minn. 367, 164 N.W.2d 866 (1969). 18

Silas Mason Co. v. Tax Commission, 302 U.S. 186 (1937). 20

Simmons v. Eagle Seelatsee, 244 F.Supp. 808 (E.D. Wash. 1965), *aff'd per curiam*, 384 U.S. 209 (1966). 12

Sims v. United States, 359 U.S. 108 (1959). 19

Smith v. Temple, 82 S.D. 560, 152 N.W.2d 547 (1967). 18

Squire v. Capoeman, 351 U.S. 1 (1956). .....10 n. 3, 20

State Board of Public Welfare v. Board of Commissioners, 262 N.C. 475, 137 S.E.2d 801 (1964). 10

State ex rel. Kennerly v. District Court, 154 Mont. 488, 466 P.2d 85 (1970). 6

Surplus Trading Co. v. Cook, 281 U.S. 647 (1930).... 20

Thomas v. Gay, 169 U.S. 264 (1898). 8, 13

United States v. Chavez, 290 U.S. 357 (1933). 2

United States v. Daney, 370 F.2d 791 (10th Cir. 1966). .....10 n. 3

United States v. McBratney, 104 U.S. 621 (1882). 17

Valdez v. Johnson, 68 N.M. 476, 362 P.2d 1004 (1961). 18

Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957). 18

Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965). 2, 9, 11, 14, 16, 17, 21

Wesberry v. Sanders, 376 U.S. 1 (1964). 11

In re Whiteshield, 124 N.W.2d 694 (N.D. 1963). 18

Williams v. Lee, 358 U.S. 217 (1959). 2, 3, 5, 7, 8, 9, 10, 15

Williams v. United States, 327 U.S. 711 (1946). 2

Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 361 P.2d 950 *cert. denied*, 368 U.S. 915 (1961). 16

STATUTES

Tit. 2 N.T.C.* 14
3 N.T.C. ch. 7, 13 ..... 15 n. 5
5 N.T.C. ch. 7 ..... 15 n. 5
5 N.T.C. §11(c) (1) ..... 15 n. 5
5 N.T.C. ch. 13 ..... 15 n. 5
5 N.T.C. ch. 15 ..... 15 n. 5
6 N.T.C. ch. 5, 9 14
7 N.T.C. §§133-34 14
Tit. 10 N.T.C. 14
13 N.T.C. Part 1 ..... 14, 15 n. 5
13 N.T.C. Part 2 13
Tit. 14 N.T.C. ..... 15 n. 5
Tit. 15 N.T.C. ..... 15 n. 5
Tit. 17 N.T.C. 14
Tit. 18 N.T.C. ..... 15 n. 5
Tit. 19 N.T.C. ..... 15 n. 5
Tit. 20 N.T.C. ..... 15 n. 5
Tit. 21 N.T.C. ..... 15 n. 5
Tit. 22 N.T.C. ..... 15 n. 5
Tit. 23 N.T.C. ..... 15 n. 5
36 Stat. 569 §20 (1910) 1, 2
67 Stat. 588-590 (1953) 1, 2

*Citations to N.T.C. refer to the Navajo Tribal Code (1969).

82 Stat. 78-80 (1968) 2
4 U.S.C. §§105-110 16
4 U.S.C. §109 ..... 16, 17
4 U.S.C. §110(e) 16
8 U.S.C. §1401(a) (2) 11
18 U.S.C. §§1151-53 ..... 3, 4
18 U.S.C. §1153 14
18 U.S.C. §1162 ..... 1, 2, 3, 4
20 U.S.C. §§236-244 14
20 U.S.C. §§631-644 14
23 U.S.C. §§201-203 14
25 U.S.C. §13 ..... 13, 14
25 U.S.C. §231 ..... 1, 7
25 U.S.C. §§232-33 20
25 U.S.C. §252-254 14
25 U.S.C. §309 14
25 U.S.C. §309a 14
25 U.S.C. §318a 14
25 U.S.C. §398 ..... 1, 12
25 U.S.C. §398c 12
25 U.S.C. §639 ..... 2, 13
25 U.S.C. §1321-26 2
25 U.S.C. §1321 ..... 2, 3, 4
25 U.S.C. §1322 ..... 2, 3, 4

25 U.S.C. §1324 3
25 U.S.C. §1326 ..... 3, 4
28 U.S.C. §1360 ..... 1, 2, 3, 4
42 U.S.C. §§2001-2005f 14
42 U.S.C. §2004a 14
Public Law 280 ..... 1, 2, 3, 4, 5, 6, 7, 8, 15, 18, 20

OTHER AUTHORITIES

Chairman's Quarterly Report to the Navajo Tribal Council, Fall Session, Nov. 1971. 12

H.R. Rep. No. 848, 83d Cong., 1st Sess. (1953); 1953 U.S. Code Cong. & Admin. News 2409. ..... 7, 15 n. 6

Hearings on H.R. 6687 Before a Subcomm. of the Senate Comm. on Finance, 76th Cong., 3d Sess. (Apr. 23, 1940). 19

Hearings on S.961-968 and S.J.Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. (1965). ..... 15 n. 6

J. Sullivan, *State Civil Power over Indians,* 33 Mont. L. Rev. 291 (1972). 8

S. Rep. No. 841, 90th Cong., 1st Sess. (1967). 5

57 I.D. 195 (1940). 11

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-834

ROSALIND MCCLANAHAN, on behalf of herself and all others similarly situated,
Appellant,

vs.

ARIZONA STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

REPLY BRIEF FOR APPELLANT

ARGUMENT

THIS BRIEF IS INTENDED TO REPLY TO APPELLEE'S BRIEF IN FIVE AREAS

1. *Application of the Arizona Enabling Act and of Public Law 280 and Amendments.*

Appellant's opening brief argues that certain federal statutes constitute Congress' continuing recognition of the sovereign independence of reservation Indians from all forms of state control, save those areas specifically ceded (such as 25 U.S.C. §§231, 398). These statutes are the Arizona Enabling Act, 26 Stat. 569 §20 (1910); Public Law 280, 67 Stat. 587 (1953) (codified in part as 18 U.S.C. §1162 and 28 U.S.C. §1360); and the successor to Pub.L. 280, Subchap-

ter III of the Indian Civil Rights Act of 1968, 25 U.S.C. §§1321-1326, 82 Stat. 78-80. Open. Br. pp. 20-24.

Appellee argues that the Arizona Enabling Act is confined merely to protection of Indian land title and has no relation to jurisdiction over persons. Ariz. Br. pp. 15-20. Appellee then contends that Pub.L. 280 has only the "limited purpose" of removing the impediment to state jurisdiction (as to Indian land title) contained in the various Enabling Acts and related state constitutional provisions. *Id.* pp. 20-26. Both of these assertions are incorrect.

This Court has referred to the Enabling Acts as applicable to the question of jurisdiction over persons on Indian reservations. The matter was discussed in *United States v. Chavez,* 290 U.S. 357, 359-60 (1933), involving federal criminal jurisdiction over non-Indians for offenses in Indian country. See also *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685, 687 n. 3 (1965); *Williams v. Lee,* 358 U.S. 217, 222 n. 10 (1959); *Williams v. United States,* 327 U.S. 711, 714 n. 10 (1946).

Public Law 280 makes clear that the Enabling Acts are broader than appellee contends, and it is equally clear that Pub.L. 280 is itself not confined to questions of Indian land title. Sections 1-4 of Pub.L. 280 (18 U.S.C. §1162 and 28 U.S.C. §1360) confer on certain named states (not including Arizona) criminal and civil jurisdiction in Indian country within those states. However, this grant expressly excludes any form of state authority over Indian trust property, real or personal. 18 U.S.C. §1162(b); 28 U.S.C. §1360(b). Sections 6 and 7 of Pub.L. 280, authorizing other states to acquire such jurisdiction, refer back to these provisions. 67 Stat. 590. The amended law as to other states is now 25 U.S.C. §1321-26, with the proprietary exception at 25 U.S.C. §§1321(b), 1322(b).

This proprietary exception has the same scope that appellee assigns to the entire Act. See Ariz. Br. pp. 15-26. If the Enabling Acts have the narrow meaning suggested by appellee, then section 6 of Pub.L. 280 (now 25 U.S.C. §1324) would have nothing to operate on and be completely pointless. And if Pub.L. 280 and its successor have the same narrow meaning, they also would have no purpose. Congress cannot have intended such an empty undertaking. Thus Pub.L. 280 is clearly broader than appellee contends, and the 1953 and 1968 Congresses clearly thought the Enabling Acts to be broader than appellee contends. See also *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971); *Williams v. Lee, supra,* 358 U.S. at 222.

As stated above, appellant's position is that these federal statutes recognized the absence of state jurisdiction over reservation Indians and were enacted to provide a procedure for the states to acquire it, which procedure Arizona has not followed. As argued in the opening brief at p. 17, state jurisdiction on Indian reservations is confined to the affairs of non-Indians unless such affairs infringe on the right of the Indians to govern themselves. However, should this Court disagree with appellant and rule that some measure of state jurisdiction over reservation Indians existed as of 1953 (including jurisidction to tax incomes), then the Court must determine what effect the enactment of Pub.L. 280 had on that jurisdiction.

As a practical matter, the problem is to reconcile Pub.L. 280 and this Court's decisions in *Williams v. Lee, supra,* and *Kennerly v. District Court of Montana, supra.* The latter provides the only significant prior ruling of this Court on the scope of Pub.L. 280.

Appellee argues that *Kennerly* is irrelevant because it dealt "only" with the jurisdiction of state courts over Indi-

ans and not with the application of state laws on reservations. Ariz. Br. p. 25. Apparently the argument is that Pub.L. 280 and its successor are also so limited. However, the statutes negate that interpretation. Pub.L. 280 provides for cession to the states of "jurisdiction over [criminal] offenses committed by or against Indians" in Indian country, "and the criminal laws of such State" shall apply in Indian country. 18 U.S.C. §1162(a); see also 25 U.S.C. §1321(a). Cession of jurisdiction is also provided "over civil causes of action between Indians or to which Indians are parties" in Indian country, "and those civil laws of such State that are of general application to private persons or private property" shall apply in Indian country. 28 U.S.C. §1360(a); see also 25 U.S.C. §1322(a). The statutes plainly refer both to state court jurisdiction and to application of state laws. Also, these statutes treat criminal and civil laws identically, and in the criminal area it is clear that Pub.L. 280 would have to operate on laws as well as courts, to deal with federal criminal statutes such as 18 U.S.C. §§1151-53. This is the law in Arizona. *Application of Denetclaw*, 83 Ariz. 299, 320 P.2d 697 (1958).

The intent of Pub.L. 280 to deal with state civil laws as well as court jurisdiction is further shown by its provision saving as valid any tribal ordinance or custom not inconsistent with state civil law after Pub.L. 280 takes effect. 28 U.S.C. §1360(c); 25 U.S.C. § 1322(c).

Finally, the legislative history of the Indian Civil Rights Act amendments to Pub.L. 280 indicates that it deals with laws as well as court jurisdiction. The principal amendment was the addition of the requirement of Indian consent to assumption of state jurisdiction. 25 U.S.C. §1326. This amendment was in response to Indian complaints about unilateral application of state laws to reservations against the

wishes of the Indians. S.Rep. No. 841, 90th Cong., 1st Sess. p. 11 (1967).

Since Pub.L. 280 applies to state laws as well as state court jurisdiction, so also does the reasoning of its interpretation in *Kennerly v. District Court of Montana, supra.*

Thus if one accepts appellee's position that the states would, in the absence of Pub.L. 280, have some measure of jurisdiction over reservation Indians (including jurisdiction to tax incomes), then one must determine the effect of Pub. L. 280 on such jurisdiction. Appellant suggests that there are three possible interpretations.

One possible interpretation of Pub.L. 280 could have been to provide a procedure for cession to the states of such jurisdiction over Indians as the states would not otherwise have. In other words, a court would first decide if a certain matter is within state jurisdiction pursuant to decisional law such as *Williams v. Lee, supra.* Only if the court determines that the matter is not thus within state jurisdiction would application of Pub.L. 280 be considered. But this interpretation is flatly inconsistent with *Kennerly v. District Court of Montana, supra.* The issue in *Kennerly* was state court jurisdiction over reservation Indians, where the tribal council had acted to confer such jurisdiction on the state. If the "infringement" test of *Williams v. Lee, supra,* is applied to the *Kennerly* situation, it would plainly be a case where the state jurisdiction does not "infringe on the right of the Indians to make their own laws and be governed by them", *Williams v. Lee, supra,* 358 U.S. at 220, and the state would have jurisdiction.[1] This was the reasoning of the Montana

[1]Appellant's position is, of course, that the "infringement" test is not to be applied case by case to reservation Indian affairs. However, appellee's position requires that it be, and it is so applied here for the sake of argument only.

Supreme Court. *State ex rel. Kennerly v. District Court*, 154 Mont. 488, 497, 466 P.2d 85, 90 (1970). Thus if Pub.L. 280 were intended to define state jurisdiction only in situations where the state would not otherwise have jurisdiction (pursuant to decisional law), then the statute would have no application to the *Kennerly* facts. The state would already have jurisdiction pursuant to the tribe's action. Yet this Court reversed the Montana court, ruling Pub.L. 280 to be a "governing act of Congress." *Kennerly v. District Court of Montana, supra*, 400 U.S. at 247. Thus the interpretation of Pub.L. 280 hypothesized at the beginning of this paragraph is negated by *Kennerly*.

A second possible interpretation of Pub.L. 280 is that it provides a procedure for cession to the states of such jurisdiction as the states did not have as of the date of its enactment in 1953, leaving untouched such jurisdiction as they did then have. This interpretation would often have the same result as that in the paragraph above, but it does differ when applied to the *Kennerly* facts. In *Kennerly* the tribal council law conferring jurisdiction on the Montana courts was passed in 1967, well after 1953. Thus under this second interpretation of Pub.L. 280, the statute would govern, and the state would acquire no jurisdiction absent compliance with it. This is the only interpretation of Pub.L. 280 which could support appellee's position in the instant case and also be consistent with *Kennerly, supra*.

This interpretation has two variants: (1) Pub.L. 280 must be obeyed to acquire jurisdiction after 1953 unless the state *could have* exercised such jurisdiction before that time, or (2) Pub.L. 280 must be obeyed to acquire jurisdiction after 1953 unless the state *actually* exercised jurisdiction in a permissible area prior to 1953. The general tenor of *Kennerly* favors the latter; *Kennerly* seems to say that Pub.L. 280 occupies the acquisition field after its enactment. This interpre-

tation, coupled with a ruling that Arizona could have exercised its taxing jurisdiction prior to 1953 under the test of *Williams v. Lee*, would require a remand to determine if Arizona actually had done so.

For the state to prevail, either variant requires this Court to decide if Arizona had jurisdiction to tax as of 1953. This would be a most awkward and unworkable standard. In each area of jurisdiction a determination would have to be made as to the state of the law in 1953. Furthermore, the court below stated that "the amount of tribal government in existence" is relevant to application of the *Williams v. Lee* infringement test. Jurisd. Statement p. 4a; 14 Ariz. App. at 454; 484 P.2d at 223. If so, the Pub.L. 280 inquiry would also require a determination of the extent of each particular tribe's government in existence in 1953.

A third possible interpretation of Pub.L. 280 is that it was intended to occupy completely the field of state jurisdiction over reservation Indian affairs (again save for specific cessions like 25 U.S.C. §231). Whether or not the states had any jurisdiction over Indians on reservations in 1953, they can subsequently exercise jurisdiction of any sort only by complying with Pub.L. 280. This interpretation is fully consistent with *Kennerly* and also with the concern of Congress in 1953 that states acquiring jurisdiction over Indians provide the services to Indians being provided by the federal government. H.R. Rep. No. 848, 83d Cong., 1st Sess. pp. 6-8 (1953); 1953 U.S. Code Cong. & Admin. News. pp. 2412-14. This interpretation of Pub.L. 280 would, of course, require reversal of the instant case, because Arizona has not complied with Pub.L. 280. On that basis the interpretation is advocated by the Brief of the Navajo Tribe of Indians, as Amicus Curiae, in Support of Jurisdictional Statement dated January 21, 1972. A recent law review article also

concludes that this interpretation is correct. J. Sullivan, *State Civil Power over Indians*, 33 Mont. L. Rev. 291, 302-306 (1972). Appellant submits that, should this Court reach this question, this interpretation should be adopted, because it is the only interpretation providing a workable rule that is consistent with *Kennerly*.[3]

Appellant further submits that the analysis above shows appellant's basic position on the proper interpretation of *Williams v. Lee, supra*, to be correct. The version of the *Williams* test advocated by Arizona is manifestly unworkable. It leads to litigation in cases involving every area of the legal affairs of reservation Indians, at least every area where a state may see some advantage to the assertion. And as explained above, the problem is further compounded by the need to reconcile the *Williams* test with Pub.L. 280 as interpreted in *Kennerly*. Such a mischievous state of affairs cannot have been intended by this Court in formulating the *Williams* test. This Court should now clear the air by restating *Williams v. Lee* as meaning that state laws have no application to the on-reservation affairs of Indians (save the area of specific cessions like 25 U.S.C. §231), and that the "infringement" test is to be employed only to determine the application of state laws to non-Indians on Indian reservations. *Cf., Thomas v. Gay*, 169 U.S. 264 (1898). This read-

---

[3]It may be objected that this interpretation would have been available to the Court in *Williams v. Lee, supra*. However, the point was not considered in that case (it did not have to be), and there is no reason why the *Kennerly* rationale could not have been an alternate ground of decision in Williams. The result would have been the same.

It may also be argued that this interpretation in effect eliminates the *Williams* "infringement" test as viable law and thus implicitly cancels that decision. However, this is not necessarily so. Pub.L. 280 is confined to jurisdictional matters involving Indians. Matters involving non-Indians on Indian reservations would still be decided by the *Williams* test—they would be subject to state jurisdiction unless infringing on the right of the Indians to govern themselves. This is, of course, appellant's position on *Williams* anyway. Open. Br. p. 17.

ing of *Williams* would avoid the difficulties of all three interpretations of Pub.L. 280 discussed above and assign to Pub. L. 280 its natural meaning: providing a procedure for cession to the states of the otherwise exclusive federal/tribal jurisdiction over reservation Indian affairs.

2. *Provision of Government Services.*

Appellee argues that Arizona's provision of state services to reservation Indians and their enjoyment of certain state rights require that Arizona have jurisdiction to levy the tax here at issue. Two contentions are made: (A) Reservation Indians are entitled to state services and privileges, because denial of these would violate the Equal Protection Clause; thus their nonliability for taxes to pay for those services would deny other citizens Equal Protection. Ariz. Br. 35-38. (B) Navajo Indians are now actually receiving services from and privileges in Arizona, and it would be inequitable for them to enjoy benefits without bearing a share of the burdens. Ariz. Br. 34-35.

As stated in the opening brief, appellant's position is that the furnishing of state services and the enjoyment of state privileges is not relevant to the legal question of state jurisdiction over reservation Indian affairs. Open. Br. p. 24. The issue is within the plenary power of Congress, and Congress has by treaty and statute recognized and protected the sovereign right of reservation Indians to self-government free of state interference. Open. Br. pp. 8-24; see also *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 686 (1965). In Pub.L. 280, Congress has provided a method for state acquisition of jurisdiction over reservation Indians, which method Arizona has declined to follow, "possibly because the people of the State anticipate that the

burdens accompanying such power might be considerable." *Williams v. Lee, supra,* 358 U.S. at 223.[8]

However, even if state benefits and privileges are deemed relevant to the issue here, appellee's argument will not withstand analysis.

A. *Equal Protection Clause.*

Two state courts have ruled that reservation Indians are citizens of the state in which their reservation lies and as such are entitled to state services. (Both decisions deal with welfare payments.) *State Board of Public Welfare v. Board of Commissioners,* 262 N.C. 475; 137 S.E.2d 801 (1964); *Acosta v. San Diego County,* 126 Cal.App.2d 455, 272 P.2d 92 (1954). The *Acosta* case expressly held that denial of services would violate the Equal Protection Clause of the Fourteenth Amendment. The Arizona Supreme Court has similarly decided that a Navajo Indian is entitled to a resident fishing license. *Begay v. Sawtelle,* 53 Ariz. 304, 88 P.2d 999 (1939). Arizona has also ruled that reservation Indians are entitled as citizens of the state to vote, serve on juries, and incorporate. See decisions cited at Ariz. Br. pp. 36-37.

Appellant knows of no modern case to the contrary of those above, nor of any authoritative federal decisions at all on the issue. Whether reservation Indians would be entitled to every state service as a matter of Equal Protection may be questioned in light of this Court's statement in *Warren*

---

[8]In *Oklahoma Tax Com'n v. United States,* 319 U.S. 598 (1943), this Court referred to state benefits in an Indian tax case. But the Indians there did not live on a reservation, and the reservation situation was expressly distinguished. 319 U.S. at 602-3. Furthermore, the continuing viability of a major part of that decision is questionable in light of *Squire v. Capoeman,* 351 U.S. 1 (1956). See *Mason v. United States,* ——F.2d—— (Ct. Cl. No. 417-70, June 16, 1972); *United States v. Daney,* 370 F.2d 791 (10th Cir. 1966).

Trading Post Co. v. Arizona Tax Commission, supra, 380 U.S. at 690-691:

> Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities. And in compliance with its treaty obligations the Federal Government has provided for roads, education and other services needed by the Indians.
>
> * * *
>
> And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.

Despite this statement, appellant contends that the cases holding Indians entitled to state services and privileges as a matter of Equal Protection are correct. Indians are citizens, 8 U.S.C. §1401(a) (2), and entitled to all rights of citizenship. They are included in the state's population for apportionment of representation in Congress, 57 I.D. 195 (1940), so that denial of their right to vote would clearly be unlawful. *Cf. Wesberry v. Sanders,* 376 U.S. 1 (1964). This Court's statement in *Warren* quoted above merely observed that the federal policy of providing for the Navajos relieves the state of the obligation to provide services as a practical matter. As will be set out below, that is very much the case.

However, appellee's argument that Indian entitlement to state services coupled with non-liability for taxes constitutes a denial of Equal Protection to other Arizona citizens is not a correct statement of the law. This Court has ruled that Indian citizenship is not inconsistent with continued federal

protection. *Creek County v. Seber*, 318 U.S. 705, 718 (1943). In that case this Court expressly ruled that an Indian tax exemption is Constitutional. *Id.* at 715. That the exemption might "possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress, not the courts." *Id.* p. 718. It should be noted that the Indians involved there did not live on a reservation and enjoyed a full measure of state services. *Oklahoma Tax Commission v. United States, supra*, 319 U.S. at 609. Thus appellant's nonliability for the tax here at issue does not deny anyone Equal Protection. See also *Simmons v. Eagle Seelatsee*, 244 F.Supp. 808 (E.D. Wash., 1965), *aff'd per curiam*, 384 U.S. 209 (1966); *cf., Gray v. United States*, 394 F.2d 96 (9th Cir.) *cert. denied*, 393 U.S. 985 (1968).

(B) *Actual Provision of Services to Navajos.*

The opinion of the Court below recites an alleged concession on oral argument by appellant's counsel that Arizona funds are expended for Navajo education and welfare on the Navajo Reservation. See also Ariz. Br. p. 34. Apparently the argument is that it would be inequitable for the Indians to receive services and not to pay taxes.

But of course Arizona is entitled to and does collect substantial tax revenues from Reservation sources. Congress has authorized the state to tax the production of Indian-owned minerals on reservations. 25 U.S.C. §§398, 398c. (There is considerable mineral production on the Navajo Reservation. See, *e.g.*, Chairman's Quarterly Rpt. to the Navajo Tribal Council, Fall Session, Nov. 1971, pp. 61-63.) Where non-Indians are using Indian reservation resources, the state can tax the non-Indian interest in the Indian property. *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir.) *cert. denied*, 404 U.S. 817 (1971); cases cited at Open. Br. pp. 14-15. And of

course non-Indians using the reservation are taxable on their own property. *Thomas v. Gay*, 169 U.S. 264 (1898). Also, the large Indian Service expenditures by the federal government and those by the Navajo Tribe itself (see discussion below) indirectly contribute large sums to Arizona tax authorities. The large numbers of non-Indians employed by the Tribe and the federal government pay Arizona taxes. The reservation is seriously underdeveloped, and thus both the Tribe and individual Indians make large purchases off the reservation in Arizona, from merchants who pay state taxes. And Indians attract millions of tourist dollars to Arizona.

For the reasons just outlined, a determination that the existing limited enjoyment of state services by Navajos is somehow "inequitable" would require a detailed factual inquiry as to just where the equities lie. This case is here on a motion to dismiss. No pleading of record raises this issue. If a factual inquiry of this sort were relevant, it would call for a remand to allow development of the facts. *Sears, Roebuck & Co. v. Metropolitan Engravers*, 245 F.2d 67 (9th Cir. 1957); *Grand Opera Co. v. Twentieth Century Fox Film Corp.*, 235 F.2d 303 (7th Cir. 1956); *Holmberg v. Williamson*, 21 Fed. Rules Serv. 63 (S.D.N.Y. 1955).

Appellant suggests that such a factual inquiry would show that Arizona receives far more than she gives. In the welfare field, 80% of the state's share of categorical aid is paid by the federal government. 25 U.S.C. §639. General assistance is furnished by the Bureau of Indian Affairs pursuant to 25 U.S.C. §13, *Ruiz v. Morton*, —— F.2d —— (9th Cir. No. 25568, May 31, 1972), and by the Tribe itself. 13 N.T.C. Part 2.[4] In the field of education, the BIA provides most of the support for its boarding schools and for

[4]Citations to N.T.C. refer to the Navajo Tribal Code (1969).

vocational education pursuant to 25 U.S.C. §§13, 309, 309a. The majority of support for public schools on the Navajo Reservation comes from federal sources. 25 U.S.C. §§252-54; 20 U.S.C. §§236-244, 631-644. Other support comes from local taxation of real property interests located on the Reservation. (See discussion above at p. 12). The Tribe itself supports education on the Reservation. Tit. 10 N.T.C. Arizona provides support only to public schools on the Reservation and only a minority of that support. And, of course, the Reservation schools educate many non-Indian children whose families pay Arizona taxes.

Most government services on the Reservation are provided by either the federal government or the Tribal government. *Cf., Warren Trading Post Co. v. Arizona Tax Commission, supra,* 380 U.S. 691 n. 17. In addition to the areas named in the last paragraph, the federal government pays almost all health services costs. 42 U.S.C. §§2001-2005f. The rest of the public support is Tribal. Tit. 13 N.T.C. All roads are fully federally financed. 23 U.S.C. §§201-203; 25 U.S.C. §318a. Development of water supplies and sanitation systems is federally financed. 42 U.S.C. §2004a. Felony prosecutions are in federal district courts by the United States Attorney. 18 U.S.C. §1153.

All other courts serving Indians are supported directly by the Navajo Tribe. Tit. 7 N.T.C. The Tribe maintains its own police force. 17 N.T.C. ch. 9. Both courts and police also serve some off-reservation Navajos (concurrently with the state) who do pay state taxes. 7 N.T.C. §§133-134. The Tribe pays its own governmental costs. Tit. 2 N.T.C. It maintains a public housing program and engages in zoning and land planning. 6 N.T.C. ch. 5, 9. It also provides a long

list of regulatory services normally provided by state and local governments.[5]

The discussion in this section shows the great complexity of the economic relationship between self-governing Indian reservations and the states in which they lie. For the Navajos, the complexity is tripled, because the Reservation is in three different states. This complexity is one of the reasons courts have always left adjustment of the relationship to the plenary control of Congress. See *Creek County v. Seber, supra,* as quoted above at p. 12. In Pub.L. 280, Congress has offered the states the opportunity to take over most governmental supervision of Indian reservations, but only by also assuming the obligation of support now borne by the federal government. *Williams v. Lee, supra,* 358 U.S. at 223. As already stated, this obligation was one concern of Congress in enacting Pub.L. 280.[6] Arizona is attempting an end run around this obligation. It is Arizona, and not the Navajos, which seeks something for nothing.

---

[5]A partial list includes: control, branding and inspection of livestock, 3 N.T.C. ch. 7, 13; business licensing, 5 N.T.C. ch. 7; tourism reg., 5 N.T.C. §11 (c) (1); licensing of common carriers, 5 N.T.C. ch. 13; reg. of signs, billboards and advertising devices, 5 N.T.C. ch. 15; reg. of slaughterhouses, restaurants, trading posts, trailer courts, dogs, burials, contagious diseases, day care centers, nursing homes, and midwives, 13 N.T.C. Part 1; highway and traffic reg., Tit. 14 N.T.C.; labor reg., Tit. 15 N.T.C.; mines and minerals, Tit. 18 N.T.C.; parks, Tit. 19 N.T.C.; professions and occupations, Tit. 20 N.T.C.; public utilities and communications, Tit. 21 N.T.C.; water, Tit. 22 N.T.C.; conservation, forestry and wildlife, Tit. 23 N.T.C.

[6]H.R.Rep. No. 848, 83d Cong., 1st Sess. pp. 6-8 (1953); 1953 U.S. Code Cong. & Adm. News pp. 2412-14. Some states wanted federal subsidies before accepting governmental responsibilities in Indian country. *Id.* This problem was still around as Congress considered the 1968 Amendment to Pub.L. 280. Senator Ervin stated, "Some States claim tfiat Public Law 280 imposes too great a financial burden and that subsidies from the Federal Government are needed if the States are adequately to enforce law on the reservation" *Hearings on S.961-968 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess. p. 4 (1965).

Finally, appellee labels the Navajos a "privileged class." Ariz. Br. p. 40. This remark displays a woeful ignorance of the economic and social situation of most reservation Indians. The tax base of the Reservation is a meager enough resource for the Tribe as it is, without Arizona invading it. See *Warren Trading Post Co. v. Arizona Tax Commission, supra,* 380 U.S. at 691.

3. *The Buck Act.*

Appellee argues that the Buck Act, 4 U.S.C. §§105-110, "was never intended" to apply to Indian reservations. Ariz. Br. p. 26. Later on that page this Court's decision in *Warren Trading Post Co. v. Arizona Tax Commission, supra,* is cited in support of the argument. The reference is presumably to 380 U.S. at 691 n. 18. This footnote supports the assertion, but it does so only in the alternative. See last sentence of the footnote. The footnote in turn refers to a dictum in *Your Food Stores, Inc. v. Village of Espanola,* 68 N.M. 327, 361 P.2d 950 *cert. denied,* 368 U.S. 915 (1961)[7]. However, as pointed out in appellant's opening brief at p. 27, both *Warren Trading Post* and the New Mexico case dealt with taxation of non-Indians on Indian reservations, and neither interpreted 4 U.S.C. §109. The New Mexico court interpreted 4 U.S.C. §110(e), defining the areas of application of the Buck Act, as excluding Indian reservations. 68 N.M. at 334, 361 P.2d at 955-56. But if this were correct, why did Congress bother to include the express Indian exemption in 4 U.S.C. §109? If *reservations* were to be exempted rather than Indians, Congress would in all probability have placed the express exemption as an exception to 4 U.S.C. §110(e).

[7]The Buck Act tax ruling in that case is dictum—or at best an alternate holding as to a minor part of the case—because the New Mexico Court's principal ruling, that Espanola could not annex Indian reservation land, was sufficient to deny the Village any jurisdiction to levy a tax.

The legislative history makes clear what happened. As appellee points out, the Interior Department sought to have Indian reservations excepted from the Act. Ariz. Br. p. 26. But vigorous objection to that proposal, on the ground that it would make Indian reservations tax havens for non-Indian businesses, led to adoption by Congress of 4 U.S.C. §109 rather than the Interior proposal cited by appellee. See discussion and quoted material at Open. Br. p. 26. Thus the Buck Act did intend to deal with taxing jurisdiction on Indian reservations, and it specifically exempted Indians from state income tax.

This discussion points up the fallacy in another of appellee's arguments. At pp. 40-41, appellee suggests that Indian reservations could become bases for a massive tax avoidance scheme and for "ruinous competition" to off-reservation businesses. Not only does the argument ignore the use tax, which is aimed at just such situations interstate, but it implies that Indian tax exemptions can be claimed by non-Indians using Inidan reservations. That very concern led to the precise language of 4 U.S.C. §109 exempting Indians only. See also *Warren Trading Post Co. v. Arizona Tax Commission, supra,* 380 U.S. at 691-692:

> Insofar as they are applied to this federally licensed Indian trader *with respect to sales made to reservation Indians on the reservation,* these state laws imposing taxes cannot stand. (emphasis added).

4. *Jurisdiction Cases Relied on by Appellee.*

Appellee relies on *New York ex rel. Ray v. Martin,* 326 U.S. 496 (1946); *Draper v. United States,* 164 U.S. 240 (1896); and *United States v. McBratney,* 104 U.S. 621 (1882). Ariz. Br. pp. 12, 17. The inapplicability of those decisions, which did not involve Indians, is adequately dealt

with at opening brief pp. 12-14. However, appellant wishes to add to the authorities there *Mull v. United States*, 402 F.2d 571, 573 (9th Cir. 1968), *cert. denied*, 393 U.S. 1107 (1969), where the Ninth Circuit recognized the peculiarity of those decisions.

Appellee also relies on *Vermillion v. Spotted Elk*, 85 N.W.2d 432 (N.D. 1957), where North Dakota upheld state court jurisidction over a reservation tort involving Indians. However, that decision pre-dated *Williams v. Lee*, *supra*, and it has been distinguished or repudiated by subsequent state court decisions. *Sigana v. Bailey*, 282 Minn. 367, 164 N.W.2d 866 (1969); *Smith v. Temple*, 82 S.D. 560, 152 N.W.2d 547 (1967); *Valdez v. Johnson*, 68 N.M. 476, 362 P.2d 1004 (1961). It is no longer the law in North Dakota, having been legislatively overruled. *In re Whiteshield*, 124 N.W. 2d 694 (N.D. 1963).

Appellee relies on *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). Because it dealt with Indians not on a federal reservation, the decision has no application to reservation issues. *Donahue v. Justice Court*, 15 Cal.App.3d 557, 563, 93 Cal. Rptr. 310, 314 (1971), *cert. denied*, 404 U.S. 990 (1971). The importance of the difference is shown by its companion case, *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962), where reservation Indian fishing rights were held to be under federal/tribal authority even in a state where Pub.L. 280 is applicable.[8]

---

[8]Appellant disagrees with the statement in the Brief for Amicus Curiae, National Congress of American Indians at p. 12 that state fishing laws were help to apply to reservation Indians in *Metlakatla*. The case held that the Secretary of the Interior had jurisdiction to the exclusion of the state. (The Metlakatla Reservation is unique in the respect that Congress had delegated its plenary authority to the Secretary of the Interior. 369 U.S. at 53.)

5. *Taxation Cases Relied on by Appellee.*

Appellee relies on *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939) and *Sims v. United States*, 359 U.S. 108 (1959). The former upheld state income taxes on federal employees and the latter upheld a federal levy on a state government to enforce the federal income tax against state employees. As pointed out in opening brief pp. 18-19, *Graves* denied an attempt to claim a tax exemption based on the source of the income. There was no question that the state had jurisdiction over the taxpayer. Appellant here does not claim an exemption based on the source of her income but on the lack of state jurisdiction over her.

It should be noted that the *Graves* decision pre-dated the enactment of the Buck Act. Thus even though *Graves* allowed states to tax the incomes of federal employees, it was still necessary for Congress to enact the Buck Act to allow states to tax the income of anyone (federal employee or not) residing and working within a federal enclave. In fact, one of the motives for the Buck Act was the inequality between two federal employees with identical jobs, one living off a federal reservation and paying state taxes, the other living on and exempt. (The example used was two Annapolis professors.) *Hearings on H.R. 6687 Before a Subcomm. of the Senate Comm. on Finance*, 76th Cong., 3d Sess. (Apr. 23, 1940) at p. 15.

Sims v. United States, supra, is a further indication of the error of the court below in its attempt to separate the tax here as "personal" from the affairs of the Navajo Tribe. See discussion at Open. Br. p. 19. As appellee apparently admits (at Ariz. Br. pp. 28-29), jurisdiction to tax appellant would lead to attempts to sue the Navajo Tribe (where its employees are concerned) to collect the tax.

Appellee points out that reservation Indians are subject to the federal income tax. Ariz. Br. p. 29. However, federal authority over reservation Indians is unquestioned. To reason from that to state authority flies in the face of numerous decisions of this Court. Such reasoning is attempted at appellee's brief p. 30, but the citation following the argument shows that it traces to the many cases in this Court ruling on the taxability or not of inheritance of, or income from, Indian trust allotments and other trust property derived from allotments. In the case of such property, tax exemption has been claimed on the basis of the federal allotment statutes, not on reservation situs, because many of the lucrative, mineral-rich allotments are located off Indian reservations in Oklahoma. Two such decisions are relied on by appellee: *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943) and *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936). The history of these cases and the possibility that the two cases just cited have been implicitly limited or overruled by *Squire v. Capoeman*, 351 U.S. 1 (1956), are discussed at length in the Jurisdictional Statement, pp. 14-15, the Briefs for Amici Curiae, National Congress of American Indians and Estate of Rose Mason, Deceased. It is appellant's position that these cases, depending solely on construction of the specific allotment statutes, have no relevance to the instant case. (Many of these same allotment statutes are cited by appellee's brief at p. 11 n. 1.)

Appellee cites two New York state cases allowing state income taxation of reservation Indians. Ariz. Br. p. 32. However, New York was ceded jurisdiction over reservation Indians by 25 U.S.C. §§232-33, statutes similar in effect to Pub.L. 280 discussed above.

Appellee cites *Silas Mason Co. v. Tax Commission*, 302 U.S. 186 (1937) and *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930). Both cases dealt only with state taxation

of non-Indians doing business on Indian reservations. No issue of that sort is present here. Appellee also argues that this Court's pre-emption ground of decision in *Warren Trading Post Co. v. Arizona Tax Commission, supra,* by implication constitutes a recognition by the Court that Arizona would otherwise have jurisdiction to tax. Not only is that fallacious reasoning, but *Warren* again dealt with taxation of a non-Indian company doing business on an Indian reservation. Also, this Court expressly reserved the Constitutional question. 380 U.S. at 686.

Respectfully submitted,

DONALD JUNEAU
RICHARD B. COLLINS, JR.
ROBERT C. ERICSON
MICHAEL R. SERWATKA
Post Office Box 306
Window Rock, Arizona 86515

THEODORE R. MITCHELL
Post Office Box 826
Saipan, Mariana Islands 96950

Dated: September 14, 1972

OPINION

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

McCLANAHAN *v.* ARIZONA STATE TAX COMMISSION

APPEAL FROM THE COURT OF APPEALS OF ARIZONA, DIVISION ONE

No. 71–834. Argued December 12, 1972—Decided March 27, 1973

The State of Arizona has no jurisdiction to impose a tax on the income of Navajo Indians residing on the Navajo Reservation and whose income is wholly derived from reservation sources, as is clear from the relevant treaty with the Navajos and federal statutes. Pp. 4–18.

14 Ariz. App. 452, 484 P. 2d 221, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

14 Ariz. App. 452, 484 P. 2d 222 (1971). We noted probable jurisdiction, 406 U. S. 916 (1972), and now reverse. We hold that by imposing the tax in question on this appellant, the State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves. The tax is therefore unlawful as applied to reservation Indians with income derived wholly from reservation sources.

I

Appellant is an enrolled member of the Navajo tribe who lives on that portion of the Navajo reservation located within the State of Arizona. Her complaint alleges that all her income earned during 1967 was derived from within the Navajo reservation. Pursuant to Ariz. Rev. Stat. § 43–188 (f), $16.20 were withheld from her wages for that year to cover her state income tax liability.[3] At the conclusion of the tax year, appellant filed a protest against the collection of any taxes on her income and a claim for a refund of the entire amount withheld from her wages. When no action was taken on her claim, she instituted this action in Arizona Superior Court on behalf of herself and those similarly situated, demanding a return of the money withheld and a declaration that the state tax was unlawful as applied to reservation Indians.

[3] The liability was created by Ariz. Rev. Stat. § 43–102 (a) which, in relevant part, provides: "There shall be levied, collected, and paid for each taxable year upon the entire net income of every estate or trust taxable upon this title and of every resident of this state and upon the entire net income of every nonresident which is derived from sources within this state, taxes in the following amounts and at the following rates upon the amount of net income in excess of credits against net income provided in §§ 43–127 and 43–128." Appellant conceded below that she was a "resident" within the meaning of the statute, and that question, which in any event poses an issue of state law, is not now before us.

The trial court dismissed the action for failure to state a claim, and the Arizona Court of Appeals affirmed. Citing this Court's decision in *Williams* v. *Lee*, 358 U. S. 217 (1959), the Court of Appeals held that the test "is not whether the Arizona state income tax infringes on plaintiff's rights as an individual Navajo Indian, but whether such a tax infringes on the rights of the Navajo tribe of Indians to be self-governing." 14 Ariz. App., at 454, 484 P. 2d, at 223. The Court thus distinguished cases dealing with state taxes on Indian real property on the ground that these taxes, unlike the personal income tax, infringed tribal autonomy.

The Court then pointed to cases holding that state employees could be required to pay federal income tax and that the State had a concomitant right to tax federal employees. See *Helvering* v. *Gerhardt*, 304 U. S. 405 (1938); *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (1939). Reasoning by analogy from these cases, the Court argued that Arizona's income tax on individual Navajo Indians did not "[cause] an impairment of the right of the Navajo tribe to be self-governing." 14 Ariz. App., at 455, 484 P. 2d, at 224.

Nor did the Court find anything in the Arizona Enabling Act, 36 Stat. 557, to prevent the State from taxing reservation Indians. That Act, the relevant language of which is duplicated in the Arizona Constitution, disclaims state title over Indian lands and requires that such lands shall remain "under the absolute jurisdiction and control of the Congress of the United States." 36 Stat. 569. But the Arizona court, relying on this Court's decision in *Organized Village of Kake* v. *Egan*, 369 U. S. 60 (1962), held that the Enabling Act nonetheless permitted concurrent state jurisdiction so long as tribal self-government remained intact. Since an individual income tax did not interfere with tribal self-government, it followed that appellant had failed to state a claim. The

Arizona Supreme Court denied a petition for review of this decision, and the case came here on appeal. See 28 U. S. C. § 1257 (2).

II

It may be helpful to begin our discussion of the law applicable to this complex area with a brief statement of what this case does not involve. We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government. See, *e. g.*, *Organized Village of Kake* v. *Egan*, 369 U. S. 60 (1962); *Metlakatla Indian Community* v. *Egan*, 369 U. S. 45 (1962); *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598 (1943). Nor are we concerned with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations. See, *e. g.*, *Thomas* v. *Gay*, 169 U. S. 264 (1898); *Utah Northern R. Co.* v. *Fisher*, 116 U. S. 28 (1885). Cf. *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 651 (1930). Nor, finally, is this a case where the State seeks to reach activity undertaken by reservation Indians on nonreservation lands. See, *e. g.*, *The Mescalaro Apache Tribe* v. *Jones*, *post*. Rather, this case involves the narrow question whether the State may tax a reservation Indian for income earned exclusively on the reservation.

The principles governing the resolution of this question are not new. On the contrary, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U. S. 786, 789 (1945). This policy was first articulated by this Court 140 years ago when Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only

acknowledged but guarantied by the United States." *Worcester* v. *Georgia*, 31 U. S. (6 Pet.) 515, 557 (1832). It followed from this concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries. "The Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States." *Worcester* v. *Georgia*, *supra*, at 561. See also *United States* v. *Kagama*, 118 U. S. 375 (1886); *Ex parte Crow Dog*, 109 U. S. 556 (1883).

Although *Worcester* on its facts dealt with a State's efforts to extend its criminal jurisdiction to reservation lands,[4] the rationale of the case plainly extended to state taxation within the reservation as well. Thus, in *The Kansas Indians*, 72 U. S. (5 Wall.) 737 (1867), the Court unambiguously rejected state efforts to impose a land tax on reservation Indians. "If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority." 72 U. S., at 755. See also *The New York Indians*, 72 U. S. (5 Wall.) 761 (1867).

[4] See also *Williams* v. *United States*, 327 U. S. 711 (1946); *United States* v. *Chavez*, 290 U. S. 357 (1933); *United States* v. *Ramsey*, 271 U. S. 467 (1926).

It is true, as the State asserts, that some of the later Indian tax cases turn not on the Indian sovereignty doctrine, but on whether or not the State can be said to have imposed a forbidden tax on a federal instrumentality. See, *e. g.*, *Leahy* v. *State Treasurer of Oklahoma*, 297 U. S. 420 (1936); *United States* v. *Rickert*, 188 U. S. 432 (1903). To the extent that the tax exemption rests on federal immunity from state taxation, it may well be inapplicable in a case such as this involving an individual income tax.[5] But it would vastly oversimplify the problem to say that nothing remains of the notion that reservation Indians are a separate people to whom state jurisdiction, and therefore state tax legislation, may not extend. Thus, only a few years ago, this Court struck down Arizona's attempt to tax the proceeds of a trading company doing business within the confines of the very reservation involved in this case. See *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U. S. 685 (1965). The tax in no way interfered with federal land or with the National Government's proprietary interests. But it was invalidated nonetheless because "from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference." 380 U. S., at 686–687.[6] As a leading text on Indian problems

[5] The federal instrumentality doctrine does not prohibit state taxation of individuals deriving their income from federal sources. See *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (1939). Cf. *Leahy* v. *State Treasurer of Oklahoma*, 297 U. S. 420 (1936). The doctrine has, in any event, been sharply limited with respect to Indians. See *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598 (1943).

[6] The Court below distinguished *Warren Trading Post* as limited to cases where the Federal Government has preempted state law by regulating Indian traders in a manner inconsistent with state taxation. See 14 Ariz. App., at 455, 484 P. 2d, at 224. But although the Court was, no doubt, influenced by the federal licensing require-

summarizes the relevant law "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress." United States Department of Interior, Federal Indian Law 845 (1958) [hereinafter cited as Federal Indian Law].

This is not to say that the Indian sovereignty doctrine, with its concomitant jurisdictional limit on the reach of state law, has remained static during the 140 years since *Worcester* was decided. Not surprisingly, the doctrine has undergone considerable evolution in response to changed circumstances. As noted above, the doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. See, *e. g., Oklahoma Tax Commission* v. *United States*, 319 U. S. 598 (1943). Similarly, notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians. See, *e. g., New York ex rel. Ray* v. *Martin*, 326 U. S. 496 (1946); *Draper* v. *United States*, 164 U. S. 240 (1896); *Utah & Northern R.* v. *Fisher*, 116 U. S. 28 (1885). This line of cases was summarized in this Court's landmark decision in *Williams* v. *Lee*, 358 U. S. 217 (1959): "Over the years this Court has modified [the *Worcester* principle] in cases where

---

ments, the reasoning of *Warren Trading Post* cannot be so restricted. The Court invalidated Arizona's tax in part because "Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities." *Warren Trading Post Co.* v. *Arizona Tax Commission*, *supra*, at 690.

essential tribal relations were not involved and where the right of Indians would not be jeopardized . . . . Thus, suits by Indians against outsiders in state courts have been sanctioned. . . . And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. . . . But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive. . . . Essentially, absent governing Acts of Congress, the question has always been whether the state action infringes on the right of reservation Indians to make their own laws and be ruled by them." 358 U. S., at 219–220 (footnote omitted).

Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption.[7] See *The Mescalero Apache Tribe* v. *Jones*, *post*. The modern cases thus tend to avoid reliance on Platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. Compare, *e. g.*, *United States* v. *Kagama*, 118 U. S. 375 (1886), with *Kennerly* v. *District Court*, 400 U. S. 423 (1971).[8]

---

[7] The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making. See U. S. Const. Art. I, § 8, cl. 3; Art. II, § 2, cl. 2. See also *Williams* v. *Lee*, 358 U. S. 217, 219 n. 4 (1959); *Perrin* v. *United States*, 232 U. S. 478, 482 (1914); Federal Indian Law 3.

[8] The extent of federal preemption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation is therefore now something of a moot question. Cf. *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 62 (1962); Federal Indian Law 846. The question is generally of little more than theoretical importance, however, since in almost all cases, federal treaties and statutes define the boundaries of federal and state jurisdiction.

The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens.[9] They have the right to vote,[10] to use state courts,[11] and they receive some state services.[12] But it is nonetheless still true, as it was in the last century, that "[t]he relation of the Indian tribes living within the borders of the United States [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they

---

[9] See 8 U. S. C. § 1401 (a) (2).

[10] See, *e. g.*, *Harrison* v. *Laveen*, 67 Ariz. 337, 196 P. 2d 456 (1948).

[11] See, *e. g.*, *Felix* v. *Patrick*, 145 U. S. 317, 332 (1892).

[12] The Court below pointed out that Arizona was expending tax monies for education and welfare within the confines of the Navajo reservation. See 14 Ariz. App., at 456–457, 484 P. 2d, at 225–226. It should be noted, however, that the Federal Government defrays 80% of Arizona's ordinary social security payments to reservation Indians, see 25 U. S. C. § 639, and has authorized the expenditure of more than $88 million for rehabilitation programs for Navajos and Hopis living on reservations. See also 25 U. S. C. §§ 13, 309, 309a. Moreover, "[c]onferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization." *The Kansas Indians*, 72 U. S. (5 Wall.) 737, 757 (1867).

reside." *United States* v. *Kagama*, 118 U. S. 375, 381–382 (1886).

III

When the relevant treaties and statutes are read with this tradition of sovereignty in mind, we think it clear that Arizona has exceeded its lawful authority by attempting to tax appellant. The beginning of our analysis must be with the treaty which the United States Government entered with the Navajo nation in 1868. The agreement provided, in relevant part, that a prescribed reservation would be set aside "for the use and occupation of the Navajo tribe of Indians" and that "no persons except those herein authorized to do, and except such officers, soldiers, agents, and employes of the government, or of the Indians, as may be authorized to enter Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." 15 Stat. 667, 668 (1868).

The treaty nowhere explicitly states that the Navajo were to be free from state law or exempt from state taxes. But the document is not to be read as an ordinary contract agreed upon by parties dealing at arms length with equal bargaining positions. We have had occasion in the past to describe the circumstances under which the agreement was reached. "At the time this document was signed the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos river in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man. In return for their promise to keep peace, this treaty 'set apart' for 'their permanent home' a portion of what had been their native country." *Williams* v. *Lee*, 358 U. S. 217, 221 (1959).

It is circumstances such as these which have led this Court in interpreting Indian treaties, to adopt the general rule that "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U. S. 363, 367 (1930). When this canon of construction is taken together with the tradition of Indian independence described above, it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajo and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. It is thus unsurprising that this Court has interpreted the Navajo treaty to preclude extension of state law—including state tax law—to Indians on the Navajo reservation. See *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U. S. 685, 687, 690 (1965); *Williams* v. *Lee*, *supra*, at 221–222 (1959).

Moreover, since the signing of the Navajo treaty, Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation.[13] Thus, when Arizona entered the Union, its entry was expressly conditioned on the promise that the State would "forever disclaim all right and title to . . . all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through and from the United States or any prior sovereignty, and that until

[13] "Congress has acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. . . . Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester* v. *Georgia* had denied." *Williams* v. *Lee*, 358 U. S. 217, 220–221 (1959) (footnote omitted).

the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the United States." Arizona Enabling Act, 36 Stat. 557, 569 (1910).[14]

Nor is the Arizona Enabling Act silent on the specific question of tax immunity. The Act expressly provides that "nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any lands and other property *outside of an Indian reservation* owned or held by any Indian." *Id.*, at 570 (emphasis added). It is true, of course, that exemptions from tax laws should, as a general rule, be clearly expressed. But we have in the past construed language far more ambiguous than this as providing a tax exemption for Indians. See, *e. g.*, *Squire* v. *Capoeman*, 351 U. S. 1, 6 (1956), and we see no reason to give this language an especially crabbed or restrictive meaning.[15]

Indeed, Congress' intent to maintain the tax exempt status of reservation Indians is especially clear in light of the Buck Act, 4 U. S. C. § 104 *et seq.*, which provides comprehensive federal guidance for state taxation of those

---

[14] This language is duplicated in Arizona's own constitution. See Ariz. Const., Art. 20, ¶ 4. It is also contained in the Enabling Acts of New Mexico and Utah, the other States in which the Navajo Reservation is located. See New Mexico Enabling Act, 36 Stat. 558–559; Utah Enabling Act, 28 Stat. 108.

[15] There is nothing in *Organized Village of Kake* v. *Egan*, 369 U. S. 60 (1962), to the contrary. In *Egan*, we held that "'absolute' federal jurisdiction is not invariably exclusive jurisdiction," and that this language in federal legislation did not preclude the exercise of residual state authority. See 369 U. S., at 68. But that holding came in the context of a decision concerning the fishing rights of *nonreservation* Indians. See 369 U. S., at 62. It did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians.

living within federal areas. Section 106 (a) of Title 4 grants to the States general authority to impose an income tax on residents of federal areas, but § 109 expressly provides that "Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed." To be sure, the language of the statute itself does not make clear whether the reference to "any Indian not otherwise taxed" was intended to apply to reservation Indians earning their income on the reservation. But the legislative history makes plain that this proviso was meant to except reservation Indians from coverage of the Buck Act, see S. Rep. No. 1625, 76th Cong., 3d Sess., 2, 4; 84 Cong. Rec. 10685 (1939), and this Court has so interpreted it. See *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U. S. 685, 691 n. 18 (1965). While the Buck Act itself cannot be read as an affirmative grant of tax exempt status to reservation Indians, it should be obvious that Congress would not have jealously protected the immunity of reservation Indians from state income taxes had it thought that the States had residual power to impose such taxes in any event. Similarly, narrower statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that the States lacked the power to impose the taxes without special authorization.[14]

Finally, it should be noted that Congress has now provided a method whereby States may assume jurisdiction over reservation Indians. Title 25 U. S. C. § 1322 (a) grants the consent of the United States to States wishing to assume criminal and civil jurisdiction over reservation

[14] See, *e. g.*, 25 U. S. C. § 398 (congressional authorization for States to tax mineral production on unallotted tribal lands). Cf. 18 U. S. C. § 1161 (state liquor laws may be applicable within reservations); 25 U. S. C. § 231 (state health and education laws may be applicable within reservation).

Indians, and 25 U. S. C. § 1324 confers upon the States the right to disregard enabling acts which limit their authority over such Indians. But the Act expressly provides that the State must act "with the consent of the tribe occupying the particular Indian country," 25 U. S. C. § 1322 (a),[17] and must "appropriately amend [its] constitution or statutes." 25 U. S. C. § 1324. Once again, the Act cannot be read as expressly conferring tax immunity upon Indians. But we cannot believe that Congress would have required the consent of the Indians affected and the amendment of those state constitutions which prohibit the assumption of jurisdiction if the States were free to accomplish the same goal unilaterally by simple legislative enactment. See *Kennerly* v. *District Court*, 400 U. S. 423 (1971).[18]

Arizona, of course, has neither amended its constitution to permit taxation of the Navajos nor secured the

---

[17] As passed in 1953, Pub. L. 280, 67 Stat. 588, delegated civil and criminal jurisdiction over Indian reservations to certain States, although not to Arizona. See 18 U. S. C. § 1162; 28 U. S. C. § 1360. The original Act also provided a means whereby other States could assume jurisdiction over Indian reservations without the consent of the tribe affected. See 67 Stat. 590. However, in 1968, Congress passed the Indian Civil Rights Act which changed the prior procedure to require the consent of the Indians involved before a State was permitted to assume jurisdiction. See 25 U. S. C. § 1322 (a). Thus, had it wished to do so, Arizona could have unilaterally assumed jurisdiction over its portion of the Navajo Reservation at any point during the 15 years between 1953 and 1968. But although the State did pass narrow legislation purporting to require the enforcement of air and water pollution standards within reservations, see Ariz. Rev. Stat. (Cum. Supp.) § 36-1801, Ariz. Rev. Stat. (Cum. Supp.) § 36-1865, it declined to assume full responsibility for the Indians during the period when it had the opportunity to do so.

[18] We do not suggest that Arizona would necessarily be empowered to impose this tax had it followed the procedures outlined in 25 U. S. C. § 1322 *et seq.* Cf. 25 U. S. C. § 1322 (b). That question is not presently before us, and we express no views on it.

consent of the Indians affected. Indeed, a startling aspect of this case is that appellee apparently concedes that, in the absence of compliance with 25 U. S. C. § 1322 (a), the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians. See appellee's brief, at 24–26.[19] But the appellee nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected. Cf. Transcript of oral argument, at 38–39. Unless the State is willing to defend the position that it may constitutionally administer its tax system altogther without judicial intervention, cf. *Ward* v. *Board of County Commissioners*, 253 U. S. 17 (1920), the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case.

IV

When Arizona's contentions are measured against these statutory imperatives, they are simply untenable. The State relies primarily upon language in *Williams* v. *Lee* stating that the test for determining the validity of state action is "whether [it] infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U. S., at 220. Since Arizona has attempted to tax individual Indians and not the tribe or reservation as such, it argues that it has not infringed on Indian rights of self-government.

In fact, we are far from convinced that when a State imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination. But even if the State's premise is accepted, we reject the suggestion that the *Williams* test was meant to apply in this situation. It must be remem-

[19] In light of our prior cases, appellee has no choice but to make this concession. See, *e. g.*, *Kennerly* v. *District Court*, *supra*; *United States* v. *Kagama*, 118 U. S. 375 (1886).

bered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. See also *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 75–76 (1962). In these situations, both the Tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

The problem posed by this case is completely different. Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaties and statutes leave for the Federal Government and for the Indians themselves. Appellee cites us to no cases holding that this legislation may be ignored simply because tribal self-government has not been infringed.[20] On the contrary, this Court expressly rejected such a position only two years ago.[21] In *Kennerly* v. *District Court*, 400 U. S. 423 (1971), the Blackfeet Indian Tribe had voted to make state jurisdiction concurrent within the reservation. Although the State had not complied with the procedural prerequisites for the assumption of jurisdiction, it argued that it was nonetheless entitled to extend its laws to the reservation since such action was obviously consistent with the wishes of the Tribe and, therefore, with tribal self-government. But we held that the *Wil-*

---

[20] *Organized Village of Kake* v. *Egan*, 369 U. S. 60 (1962), is not such a case. See n. 15, *supra*.

[21] Indeed, the position was expressly rejected in *Williams*, itself, upon which appellee so heavily relies. *Williams* held that "*absent governing Acts of Congress*, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U. S., at 220 (emphasis added).

liams rule was inapplicable and that "[t]he unilateral action of the Tribal Council was insufficient to vest Montana with jurisdiction." 400 U. S., at 427. If Montana may not assume jurisdiction over the Blackfeet by simple legislation even when the Tribe itself agrees to be bound by state law, it surely follows that Arizona may not assume such jurisdiction in the absence of tribal agreement.

Nor is the State's attempted distinction between taxes on land and on income availing. Indeed, it is somewhat surprising that the State adheres to this distinction in light of our decision in *Warren Trading Post Co.* v. *Arizona Tax Commission, supra,* wherein we invalidated an *income tax* which Arizona had attempted to impose within the Navajo Reservation. However relevant the land-income distinction may be in other contexts, it is plainly irrelevant when, as here, the tax is resisted because the State is totally lacking in jurisdiction over both the people and the lands it seeks to tax. In such a situation, the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself.

Finally, we cannot accept the notion that it is irrelevant "whether the . . . state income tax infringes on [appellant's] rights as an individual Navajo Indian," as the State Court of Appeals maintained. *McClanahan* v. *State Tax Commission,* 14 Ariz. App. 452, 454, 484 P. 2d 221, 223 (1970). To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights. This Court has therefore held that "the question has always been whether the state action infringed on the right of *reservation Indians* to make their own laws and be ruled by them." *Williams* v. *Lee, supra,* at 220 (emphasis added). In

this case, appellant's rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose. Accordingly, the judgment of the court below must be

Reversed.